No. 2721

United States Court of Appeals
For the First Circuit

No. 5172.

HAROLD HOBART,

DEFENDANT, APPELLANT,

v.

MICHAEL P. O'BRIEN,

PLAINTIFF, APPELLEE.

No. 5173.

HAROLD M. HOBART,

PLAINTIFF, APPELLANT,

v.

JOHN G. DONOVAN ET AL.,

DEFENDANTS, APPELLEES.

CONSOLIDATED RECORD APPENDIX TO BRIEFS FOR THE APPELLANTS

Volume I.
Pleadings and Testimony.
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Pleadings and Testimony

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

I, JOHN A. CANAVAN, Clerk of the United States District Court, District of Massachusetts, do hereby certify that the following entries are on the Civil Action Docket, in the cause entitled:

C.A. 52-741-M

MICHAEL P. O'BRIEN
v.
HAROLD HOBART

1952

June 26 Complaint filed. Summons issued.
27 Petition for Issuance of Writ of Ne Exeat, filed by Plaintiff.
27 WYZANSKI, J. Petition for Issuance of Writ of Ne Exeat denied.
30 Marshal's return of Summons, with service, filed.
July 16 Defendant's Answer filed. Claim of jury trial by defendant.
Nov. 15 Defendant's Interrogatories to Plaintiff, filed.
Dec. 16 Defendant's application for default against plaintiff for failure to answer interrogatories. 20 day order entered. Notices mailed.

1953

Jan. 8 Stipulation extending time for filing answers to Defendant's Interrogatories to and including January 31, 1953, filed.
Feb. 12 Plaintiff's Answer to Defendant's Interrogatories, filed.
Mar. 2 Defendant's Motion to Strike Out and Further Answer filed.

1953

30 SWEENEY, Ch.J. Defendant's Motion to Strike Out and Further Answer allowed, after hearing. No one appeared for plaintiff.

May 13 Defendant's Motion to Dismiss,—for failure to comply with Court Order of March 30, 1953, to further answer Defendant's Interrogatories, filed.

20 Appearance of Thomas H. Mahony, Esq., for defendant, filed.

25 FORD, J. Hearing on Defendant's Motion to Dismiss. Motion denied. Further answers to be filed within ten days.

June 5 Plaintiff's further answers to interrogatories filed.

Sept. 22 Motion for Court Order requiring plaintiff to produce and to permit defendant to inspect and take a copy of Massachusetts Memorial Hospital records, filed, by defendant.

22 Motion for Court Order requiring plaintiff to produce and permit defendant to inspect and take a copy of Saugus Hospital records, filed.

Oct. 5 McCARTHY, J. Deft's. motion for Order Requiring Pltf. to Produce and Permit deft. to inspect and Take a copy of the Mass. Memorial Hospital Record allowed, no one appearing for plaintiff. 14 Days.

Deft's. motion for an order requiring pltf. to produce and to permit deft. to inspect and take a copy of Saugus Hospital Records, allowed, no one appearing for pltf. 14 days. Order mailed to counsel.

1954

June 2 Deft.'s. motion for hospital records filed.

14 McCarthy, J. Deft's. motion to produce hospital records allowed, no one appearing for pltf. Pltf's. counsel notified.

Aug. 23 Appearance of Michael T. Prendergast for pltf. filed.

23 Pltf's. motion to inspect and copy documents filed.

23 Pltf's. motion to increase Ad Damnum filed.

24 Interrogatories by pltf. to deft. filed.

Sept. 15 Deft's. Motion to amend answer filed.

17 Pltf's. request that deft. be defaulted for failure to answer interrogatories, filed. Twenty Day Order entered. Copies to counsel.

21 Deft's. answers to pltf's. interrogatories, filed.

27 McCarthy, J. On deft's. motion to amend answer, motion allowed, no one appearing to oppose.

Oct. 13 Deft's. motion for summary judgment filed.

25 Deft's. request for admission of facts filed.

Nov. 5 Pltf's. answers to deft's. requests for admissions filed.

9 Pltf's. answer to deft's. interrogatories filed.

19 Deft's. motion to expunge, filed.

Dec. 17 Notice of marking motion to expunge filed by deft.

27 McCarthy, J. Hearing on deft's. motion to expunge—advisement.

28 McCarthy, J. Deft's. motion to expunge denied. Notices to counsel.

1955

Nov. 10 McCarthy, J. Trial by jury (with CA 53-521M) begins. Jury impanelled, Francis P. Flynn, foreman.

1955

29 McCarthy, J. Jury trial continues. Pltf. O'Brien's opening statement evidence. No. 5 juror, Dorothy I. Farnham, excused by agreement.

30 McCarthy, J. Jury trial continues. Evidence.

Dec. 1 McCarthy, J. Jury trial continues. Evidence.

2 McCarthy, J. Jury trial continues. Evidence.

6 McCarthy, J. Jury trial continues. Evidence. Pltf. rests. Motion for directed verdict filed by deft. Hobart. Motion denied.

7 McCarthy, J. Jury trial continues. Evidence.

8 McCarthy, J. Jury trial continues. Evidence. Pltf's. motion to substitute complaint filed.

9 McCarthy, J. Jury trial continues. Evidence. Pltf. O'Brien's motion to substitute complaint allowed. Deft's. oral motion for directed verdict made by deft. Hobart, decision reserved. Deft's. motion for summary judgment, decision reserved. Arguments to jury. Charge to jury. Case committed to jury.

10 McCarthy, J. Jury returns verdict for pltf.; damages assessed in sum of $61,000.00. Jury discharged.

13 McCarthy, J. Deft's. motion for summary judgment denied. Counsel notified.

13 McCarthy, J. Judgment entered for pltf. in the sum of $61,000.00 plus interest in the amount of $12,677.83 and costs taxed at $. Copies to counsel.

14 Deft's. motion for judgment n.o.v. under 50b, filed.

19 McCarthy, J. Steno. testimony of Dec. 2d, filed.

23 Appearance of Philip B. Buzzell filed for deft.

1956

Jan. 31 Steno. transcript filed. Vols. I, II, IV, VI and VII.

Feb. 7 Vol. IV (pp. 379 to 384) of steno. testimony filed.

15. Vols. V and VIII of Steno. testimony filed.

24 McCarthy, J. Hearing on deft's motion for judgment n.o.v. under rule 50B and deft's. motion to amend judgment. Advisement.

July 2 McCarthy, J. Memorandum on motion for new trial or for judgment n.o.v. filed by deft.—Motion for judgment n.o.v. denied and motion for new trial denied upon condition that pltf. remit the sum of $13,000. within 20 days, then new trial on issue of damages only. Memo. filed.

10 Plaintiff's remittitur in the sum of $13,000.00 in accordance with order of the Court made on July 2nd, 1956, filed.

25 Appearance of Joseph G. Bryer, Esq., for the defendant, filed.

25 Notice of appeal filed by the defendant.

25 Motion to consolidate gross actions filed, with certificate of notice.

26 Copy of n/a mailed to Samuel H. Cohen, Esq., 20 Pemberton Sq., Boston, Reuben H. Nitkin, Esq., 110 State St., Boston.

27 McCarthy, J. Motion for enlargement of time for filing record on appeal, filed and assented to—allowed.

27 Motion to Consolidate Cross actions allowed.

27 Bill of Costs, filed. Costs taxed in the amount of $368.40.

28 Bond on appeal filed. $250.00 deposited in lieu of surety).

In Testimony Whereof, I hereunto set my hand and affix the seal of the aforesaid Court at Boston, said District, this 30th day of August, 1956.

[Seal] John A. Canavan, *Clerk*

By: (s) Eleanor Taylor, *Deputy Clerk*

COMPLAINT.

1. The plaintiff, Michael P. O'Brien, is a citizen and resident of the Commonwealth of Massachusetts.

2. The defendant, Harold Hobart, is a citizen and resident of Washington, District of Columbia.

3. The defendant, Rudolph F. King, as Registrar of Motor Vehicles for the Commonwealth of Massachusetts, is a citizen of the Commonwealth of Massachusetts.

4. That the matter in controversy for the plaintiff exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000) Dollars.

5. That on June 21, 1952, on a public highway designated as Route 2 in the Town of Concord, County of Middlesex, Commonwealth of Massachusetts, the defendant, Harold Hobart, negligently drove a motor vehicle so that it collided with the motor vehicle being operated by the plaintiff, and that the plaintiff, who was in the exercise of due care, as the result of the negligence of the defendant, was seriously injured and was prevented from transacting his business, and suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization.

Wherefore:

The plaintiff, Michael P. O'Brien, demands judgment against the defendant in the sum of Twenty-Five Thousand ($25,000) Dollars.

The plaintiff demands a trial by jury.

(s) Reuben H. Nitkin

Attorney for plaintiff

DEFENDANT'S ANSWER.

Now comes the defendant Harold Hobart in the above entitled action and makes this his answer to the Plaintiff's Bill of Complaint.

First Defense

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that he is a citizen and resident of the Commonwealth of Massachusetts.

2. The defendant admits that he is a citizen and resident of Washington, District of Columbia.

3. The defendant denies that the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

4. The defendant denies each and every allegation contained in paragraph five of the Plaintiff's Complaint.

Second Defense

5. The defendant says that the accident and injuries alleged in paragraph five of the Plaintiff's Complaint were caused, in whole or in part, by the plaintiff's own negligence.

Defendant claims trial by jury.

(s) MERRITT J. ALDRICH
Attorney for the Defendant

DEFENDANT'S INTERROGATORIES TO THE PLAINTIFF.

1. What is your full name, date of birth, residence, business and business address?

2. What was the date and time of your accident?

3. Where did your accident occur?

4. Please describe in complete detail how your alleged accident occurred, stating what you saw and did in the order in which the events took place.

5. How far in feet was the vehicle in which you were riding from the point of the accident when you first saw the other vehicle?

6. How far in feet was the other vehicle from the point of the accident when you first saw it?

7. How far in feet was the vehicle in which you were riding from the other vehicle when you first saw the other vehicle?

8. What was the speed in miles per hour of the vehicle in which you were riding:

(a) When you first saw the other vehicle?

(b) At the time of the accident?

9. What was the speed in miles per hour of the other vehicle:

(a) When you first saw it?

(b) At the time of the accident?

10. What part of the vehicle in which you were riding came in contact with the other vehicle?

11. What part of the other vehicle came in contact with the vehicle in which you were riding?

12. What was the course:

(a) Of the other vehicle from the time you first saw it to the point of the accident?

(b) Of the vehicle in which you were riding from the time you first saw the other vehicle to the point of the accident?

13. If the brakes of the vehicle in which you were riding were applied just prior to the alleged accident, please state the distance in feet said vehicle was from the point of the accident when said brakes were first applied.

14. Please state the distance in feet the vehicle in which you were riding travelled after the accident to the point where it first came to a full stop.

15. Give an itemized statement to date of all monetary

oss incurred by you or in your behalf as a result of the
lleged accident.

16. If you claim personal injury as a result of your
ccident, give:

(a) A complete description of the injuries you received.

(b) A complete description of the injuries you believe are permanent.

(c) The names and addresses of all doctors who treated you.

(d) A complete description of the treatment you received.

(e) The dates on which you received such treatment.

(f) The dates between which you were confined to your home.

(g) The dates between which you were confined to your bed.

(h) The dates between which you were absent from your work or from school.

(i) A description of any accidents, illnesses, or diseases which you have had within two years prior or subsequent to your accident.

(j) The wages, salary or business profits you were receiving at the time of your accident.

(k) The name and address of your employer, or the name and address of the school you were attending at the time of your accident.

(s) MERRITT J. ALDRICH

Attorney for the Defendant

PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES.

1. Michael P. O'Brien, December 4, 1882; 86 Kenmere Road, Medford; 151 Highland Ave., Somerville, Mass., chauffeur.

2. June 21, 1952.

3. Route 2, Concord, Mass.

4. I was proceeding on Route 2, Concord, in the general direction of Boston. The truck I was operating was about 25 ft. to the rear of a vehicle ahead of me travelling in the same direction, when my truck was suddenly struck. The defendant, coming from the opposite direction, came over on to my side of the road and his vehicle collided with the truck I was operating.

5. I formed no judgment as to the distance in feet.

6. I formed no judgment as to the distance in feet.

7. I formed no judgment as to the distance in feet.

8. (a) about 25 m.p.h.
   (b) about 20 m.p.h.

9. (a) and (b) I formed no judgment as to the distance in miles per hour of the other vehicle.

10. Left front and forward left side.

11. Left front.

12. (a) it cut to its left;
    (b) as a result of the collision between the vehicles my car turned left across the roadway.

13. I applied my brakes but have no judgment as to distance in feet my vehicle was when I first applied its brakes.

14. About 25 ft.

15. $2900 loss of earnings up to date. I am still incapacitated.

16. (a) concussion of brain with unconsciousness; laceration of left forearm; contusion of nose with edema; contusion with ecchymosis of left arm

anteriorally at joint; contusion and laceration of left elbow with severe pain and edema of the joint; laceration of right knee; contusions and abrasions of left knee with edema; fracture of left 4th, 5th, 6th, 7th, 8th & 10th ribs; pleuritis with effusion in left chest; post-operative adhesions in left chest with continuous pains; contusion of abdomen with left traumatic, direct, inguinal hernia.

(b) inguinal hernia, fracture of ribs and defects therefrom;

(c) Dr. Robert E. Farrand, 67 Bay State Road, Boston, Dr. J. Laurence Golden, 333 Winthrop St., Medford, Dr. Barnet Baskies, 380 Salem St., Medford

(d) diathermy; internal and external anelgesic and narcotics for pain; paracentesis and herniorrophies; hospitalization;

(e) I am still under treatment for the injuries;

(f) June 21, 1952, to approximately August 8, 1952, and February 3, 1953, to date;

(g) June 21 to about July 22, 1952, and February 3, 1953, to date;

(h) I am still unable to return to my equipment;

(i) none;

(j) $99.00

(k) Utility Oil Co., 151 Highland Avenue, Somerville, Mass.

The above answers are made under pains and penalties of perjury this 10th day of February, 1953.

(s) MICHAEL P. O'BRIEN

PLAINTIFF'S FURTHER ANSWERS TO DEFENDANT'S INTERROGATORIES.

15. Loss of wages approximately $4356; Dr. Barnet Baskies $636., Dr. Germain J. Cotta $325., Dr. Robert E. Ferrand $135., Dr. Wilfred Forbes $5., Dr. J. Laurence Golden $25., Saugus Hospital $1045., Ring's Rest Home $70., Dr. A. W. Bukowski $50., Dr. Keith Merrill, bill uncertain, Mass. Memorial Hospital $709.56.

16. (e) I was hospitalized at the Saugus Hospital for sixty-one days following the accident. I was also hospitalized at the Mass. Memorial Hospital from March 7 to April 3, 1953. I was treated by Dr. Barnet Baskies from June 21, 1952, to the present time. I was treated by Dr. Robert E. Ferrand on June 24, July 3, 5, 7, 9 and 10, 1952. Dr. I. M. Madoff performed operation on my lung at the Mass. Memorial Hospital.

The above answers are made under pains and penalties of perjury this third day of June, 1953.

(s) MICHAEL P. O'BRIEN

PLAINTIFF'S MOTION TO INCREASE THE AD DAMNUM.

Now comes the plaintiff in the above entitled action and respectfully moves that the ad damnum be increased from Twenty-five Thousand ($25,000.00) to One Hundred Thousand ($100,000.00) Dollars.

By his Attorney,

(s) MICHAEL T. PRENDERGAST

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY THE DEFENDANT UNDER OATH.

1. Please identify yourself, giving your full name, business and address.

2. Please state your age, giving date of birth.

3. If you are answering these interrogatories on behalf of a defendant corporation, please state what office you hold in said corporation.

4. Were you or the corporation referred to in interrogatory #3 the owner of the vehicle concerned in the accident alleged in the plaintiff's declaration?

5. Please identify the operator of the said vehicle, giving his or her full name and address.

6. In what state was the operator of said vehicle licensed and what was the number of the license?

7. What was the registration number of the vehicle owned or operated by the defendant?

8. If you were not the operator of the vehicle at the time of the accident, was it then being operated by a person in the employ of the defendant?

9. Was the said vehicle being operated at the time of the alleged accident with either the express or implied permission of the defendant?

10. Was the said vehicle being operated in the interest and for the benefit of the defendant at the time of the alleged accident?

11. Please describe as accurately as possible the place where the accident referred to in the plaintiff's declaration occurred.

12. Please describe the relative positions of the defendant's vehicle and the plaintiff and or the plaintiff's vehicle at the moment of contact.

13. Please describe the scene immediately after the collision when the plaintiff and the defendant were no longer

in motion, giving their relative positions with regard to each other and their respective distances and directions from the place of contact, with measurements as far as possible.

14. When, just prior to the occurrence of the alleged accident, did the operator of the defendant's vehicle first become aware of the presence of the plaintiff and or the plaintiff's vehicle?

15. Please state where the defendant's vehicle was at the time you first saw the plaintiff and or the plaintiff's vehicle, giving measurements and relative positions with regard to any identifiable objects in the immediate vicinity as far as possible.

16. Please state where the plaintiff and or the plaintiff's vehicle was at the time when first seen by you, giving measurements and relative positions with regard to any identifiable objects in the immediate vicinity as far as possible.

17. Please state as nearly as you can the rate at which the defendant's vehicle was moving at the time when you first saw the plaintiff and or the plaintiff's vehicle.

18. Please state the rate at which the defendant's vehicle was moving at the moment of contact.

19. Please state the rate of speed at which the plaintiff and or the plaintiff's vehicle was moving at the time when first seen by you.

20. What was the rate of which the plaintiff and or the plaintiff's vehicle was moving at the moment of contact?

21. If the defendant's vehicle had any mechanical defects which might have affected its operation at the time of the alleged accident, please describe these said defects.

22. Please describe the atmospheric conditions at the time of the accident, including the weather and condition of the road.

23. Please describe fully how the accident occurred, stating the events in the order in which they took place.

24. Please state everything that you did from the time you first saw the plaintiff up to and including the time of the accident.

25. Kindly describe the part or parts of your automobile which were damaged as a result of the accident.

26. Were the brakes of the defendant's motor vehicle applied before the accident and, if so, state the speed of said vehicle when the brakes were last applied just before accident occurred.

27. Did the defendant's motor vehicle jackknife at any time before the accident occurred and, if so, please state the speed of said vehicle at the time the jackknifing occurred.

By his Attorney,
(s) MICHAEL T. PRENDERGAST

DEFENDANT'S MOTION TO AMEND HIS ANSWER.

Now comes the defendant in the above entitled action and moves to amend his Answer heretofore filed in Court to include the following defense:

Third Defense

6. And further answering, the defendant says that on the date of the alleged accident, June 21, 1952, the plaintiff was an employee of Utility Oil Company of Somerville, Massachusetts, an insured person under the provisions of the Massachusetts Workmen's Compensation Act, Massachusetts General Laws (Ter. Ed.) C. 152; that on said date the insurer of the risk was the Home Indemnity Insurance Company; that following the said accident the plaintiff elected to receive and did thereafter, by agreement, dated August 8, 1952, receive from the Home In-

demnity Co. weekly workmen's compensation benefits, retroactive to June 23, 1952, under the provisions of C. 152; that on June 26, 1952, the plaintiff instituted the present action to recover damages for injuries allegedly arising out of the same accident for which the plaintiff was receiving and thereafter continued to receive weekly workmen's compensation benefits; that under the provisions of S. 15 of C. 152 of the Workmen's Compensation Act plaintiff had the option of proceeding at law for damages or of proceeding against the insurer for compensation, but not for both; that S. 15 of C. 152 further provides that the insurer who has paid compensation may thereafter and for its own benefit either in its own name or in the name of the injured employee, proceed at law to enforce the liability of a third party, and that if the insurer does not so proceed within nine months from the date of the alleged injury, the employee may so proceed. And the defendant says that the present action was not commenced by the Home Indemnity Insurance Company, its servants, agents or attorneys, to enforce its subrogation rights against the defendant, but was commenced by the plaintiff O'Brien in his own name and as his own behalf.

By reason of which foregoing, the defendant says that the plaintiff commenced this action prematurely and prior to the nine-month period prescribed by S. 15 of C. 152; that the plaintiff was not as a matter of law entitled to commence this action on his own behalf on June 26, 1952, the date of his writ.

Wherefore the defendant prays that this action be dismissed.

By his Attorney,

(s) MERRITT J. ALDRICH

McCARTHY, D.J.—Sept. 27, 1954

Motion allowed

By the Court

(s) D. W. WALSH

Deputy Clerk.

DEFENDANT'S ANSWERS TO THE PLAINTIFF'S INTERROGATORIES.

1. Harold M. Hobart, 5110 Manning Place, N.W. Washington, D.C.; self-employed.
2. Age 48.
3. Not so answering.
4. No.
5. See answer to #1.
6. Washington, D.C., license #
7. 5765 (D.C.)
8. I was the operator.
9. Yes.
10. Yes.
11. Route #2, Concord, Massachusetts, near the Acton line.
12. Headed in opposite directions.
13. Impact forced my car diagonally over to my right and up against a fence. The other vehicle came to a stop diagonally across the road to the rear of my car, after striking the car behind me.
14. Just prior to the alleged accident.
15. Route #2, Concord, Massachusetts headed towards Acton.
16. Approaching from the opposite direction, on Route #2.
17. About 30 miles per hour.
18. About 20 miles per hour.
19. About 40 miles per hour.
20. About 40 miles per hour.
21. None.
22. Good.
23. The other vehicle, coming from the opposite direction, came partly over into my lane, striking the left front of my car.
24. Travelled straight ahead, then applied my brakes.

25. Vehicle was a total loss.
26. Yes; about 30 miles per hour.
27. No.

(s) HAROLD M. HOBART

Subscribed and sworn to this 17th day of September, 1954 before me.

(s) NEIL H. WHITE
Notary Public
Notary Public, D.C.

[SEAL] Commission Expires Oct. 31, 1958

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT.

The defendant moves the Court to enter pursuant to Rule 56 of the Federal Rules of Civil Procedure the Summary Judgment in the Defendant's favor dismissing the action on the ground that the Defendant is entitled to a judgment as a matter of law. This motion is based upon the facts that the defendant says that on the date of the alleged accident, June 21, 1952, the plaintiff was an employee of Utility Oil Company of Somerville, Massachusetts, an insured person under the provisions of the Massachusetts Workmen's Compensation Act, Massachusetts General Laws (Ter. Ed.) C. 152; that on said date the insurer of the risk was the Home Indemnity Insurance Company; that following the said accident the plaintiff elected to receive and did thereafter, by agreement, dated August 8, 1952, receive from the Home Indemnity Co. weekly workmen's compensation benefits, retroactive to June 23, 1952, under the provisions of C. 152; that on June 26, 1952, the plaintiff instituted the present action to recover damages for injuries allegedly arising out of the same accident for which the plaintiff was receiving and thereafter continued to receive weekly workmen's compensation benefits; that under the provisions of S. 15 of

C. 152 of the Workmen's Compensation Act plaintiff had the option of the proceeding at law for damages or of proceeding against the insurer for compensation, but not for both; that S. 15 of C. 152 further provides that the insurer who has paid compensation may thereafter and for its own benefit either in its own name or in the name of the injured employee, proceed at law to enforce the liability of a third party, and that if the insurer does not so proceed within nine months from the date of the alleged injury, the employee may so proceed. And the defendant says that the present action was not commenced by the Home Indemnity Insurance Company, its servants, agents or attorneys, to enforce its subrogation rights against the defendant, but was commenced by the plaintiff, O'Brien, in his own name and as his own behalf.

By reason of which foregoing, the defendant says that the plaintiff commenced this action prematurely and prior to the nine-month period prescribed by S. 15 of C. 152; that the plaintiff was not as a matter of law entitled to commence this action on his own behalf on June 26, 1952, the date of his writ.

(s) THOMAS H. MAHONY
Attorney for the Defendant

McCARTHY, J—Dec. 13, 1955
Motion denied.
By the Court,
(s) DAVID W. WALSH
Deputy Clerk.

DEFENDANT'S REQUEST FOR ADMISSION OF FACTS.

Now comes the defendant in the above-entitled action and, as authorized by Rule 36 of the Federal Rules of Civil Procedure, calls upon the plaintiff to admit or deny within ten days from the date hereof the following facts:

1. That the plaintiff's alleged automobile accident occurred on Saturday, June 21, 1952, on Route #2, Concord, Massachusetts.

2. That at the time of the alleged accident the plaintiff was employed by the Utility Oil Co., Somerville, Massachusetts.

3. That the vehicle being operated by the plaintiff at the time of the alleged accident was owned by and registered in the name of the said Utility Oil Co.

4. That at the time of the alleged accident the plaintiff was operating the said vehicle on the business of the said Utility Oil Co.

5. That at the time of the alleged accident the plaintiff was in the course of his employment by and for the said Utility Oil Co.

6. That the plaintiff's alleged injuries arose out of and in the course of his employment with the said Utility Oil Co.

7. That the plaintiff commenced the present action by Bill of Complaint dated June 26, 1952, returnable at Court July 16, 1952.

8. That the plaintiff retained Reuben H. Nitkin, Esq., 110 State Street, Boston, Massachusetts, to represent him and authorized the said Nitkin to commence the present action.

9. That the plaintiff signed an "Agreement as to Compensation" dated August 8, 1952.

10. That the said "Agreement as to Compensation" provided for the payment to the plaintiff by Home Insurance Indemnity Co. of a weekly Workmen's Compensation benefit for and on account of injuries claimed to have been received by the plaintiff in the aforesaid automobile accident of June 21, 1952.

11. That the said Agreement as to Compensation expressly provided that it "shall be payable from and

including the twenty-third day of June, 1952, until terminated."

12. That the said Agreement provided that the date of the first payment thereunder should be August 11, 1952, the same to be in the amount of $210.00.

13. That the plaintiff thereafter received and accepted the weekly benefit provided by the aforesaid Agreement.

14. That the plaintiff signed an "Agreement for Lump Sum Payment" dated July 21, 1954.

15. That the Lump Sum Agreement called for the payment to the plaintiff of $4,850.00, plus an attorney's fee of $675.00.

16. That the plaintiff received and accepted the sum of $4,850.00 called for by the said Lump Sum Agreement.

17. That the plaintiff received from Home Indemnity Insurance Co. a total of $8,120.00 in Workmen's Compensation benefits for and on account of injuries allegedly sustained as a result of the automobile accident which is the basis of the present action.

18. That at no time subsequent to June 26, 1952, has the plaintiff discontinued the present action.

By his Attorney,

(s) MERRITT J. ALDRICH

PLAINTIFF'S ANSWER TO DEFENDANT'S REQUEST FOR ADMISSION OF FACTS.

1. Admitted.
2. Admitted.
3. I have no personal knowledge of the fact.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.

8. Reuben H. Nitken, Esq., represents the interest of the Home Indemnity Insurance Co. and the plaintiff, and was authorized to commence and to continue to maintain this action.
9. Admitted.
10. Admitted.
11. I have no personal knowledge of the fact.
12. Admitted.
13. Admitted.
14. Admitted.
15. Denied.
16. Admitted.
17. Admitted.
18. Admitted.

(s) MICHAEL P. O'BRIEN, *Plaintiff*

Subscribed and sworn to before me this 4th day of November, 1954.

(s) REUBEN H. NITKIN, *Justice of the Peace*

MOTION FOR DIRECTED VERDICT

Now comes the defendant and moves the Court to direct the jury to return a verdict for the defendant and assigns as reason therefor the following:

1. The plaintiff has failed to sustain the burden of proving negligence chargeable to the defendant.
2. The plaintiff, as a matter of law, was guilty of contributory negligence.
3. The plaintiff is not entitled to recover by reason of the provisions of General Laws, Chapter 152, section 15.

By his attorney,

(s) THOMAS H. MAHONEY

McCARTHY, J.—Dec. 6, 1955.

Motion denied

By the Court

(s) DAVID W. WALSH
Deputy Clerk.

PLAINTIFF'S MOTION TO SUBSTITUTE.

Now comes the plaintiff in the above entitled action and respectfully moves that the Bill of Complaint now on file be stricken, and that the attached Bill of Complaint be substituted in lieu thereof.

By his Attorney,

(s) M. T. Prendergast

McCarthy, J.—Dec 9, 1953

Motion allowed.

By the Court

(s) David W. Walsh

Deputy Clerk.

United States District Court

District of Massachusetts

C.A. No. 52-741

Michael P. O'Brien

v.

Harold Hobart

Complaint.

1. The plaintiff, Michael P. O'Brien, is a citizen and resident of the Commonwealth of Massachusetts.

2. The defendant, Harold Hobart, is a citizen and resident of Washington, District of Columbia.

3. The defendant, Rudolph F. King, as Registrar of Moter Vehicles for the Commonwealth of Massachusetts, is a citizen of the Commonwealth of Massachusetts.

4. That the matter is controversy for the plaintiff exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000) Dollars.

5. That on June 21, 1952, on a public highway designated as Route 2 in the Town of Concord, County of Mid-

dlesex, Commonwealth of Massachusetts, the defendant, Harold Hobart, negligently drove a motor vehicle so that it collided with the motor vehicle being operated by the plaintiff, and that the plaintiff, who was in the exercise of due care, as the result of the negligence of the defendant, was seriously injured and was prevented from transacting his business, and suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization.

WHEREFORE:

The plaintiff, Michael P. O'Brien, demands judgment against the defendant in the sum of Two Hundred and Fifty Thousand ($250,000) Dollars.

The plaintiff demands a trial by jury.

(s) M. T. PRENDERGAST
Attorney for Plaintiff
70 State Street
Boston, Massachusetts

VERDICT.

We, the Jury, find for the Plaintiff and assess damages in the sum of $61,000.

December, 1955. (s) FRANCIS P. FLYNN
Foreman

Judge McCarthy has this day denied the motion of the Defendant for summary judgment filed on October 13, 1954.

DAVID W. WALSH
Deputy Clerk.

JUDGMENT.

McCARTHY, D. J.

This cause having come on for trial before the court and a jury and the jury having rendered a verdict for the Plaintiff in the sum of sixty-one thousand dollars ($61,000.00), it is hereby

ORDERED that judgment be and is hereby entered for the Plaintiff in the sum of sixty-one thousand dollars ($61,000.00) with interest thereon from June 26, 1952 to date in the sum of twelve thousand six hundred seventy-seven dollars and eighty-three cents ($12,677.83) and for his costs taxed at $

DATED at Boston this thirteenth day of December, 1955.

By the Court:

(s) DAVID W. WALSH
Deputy Clerk

(s) WILLIAM T. McCARTHY
United States District Judge.

DEFENDANT'S MOTION FOR JUDGMENT N.O.V. UNDER RULE 50 B.

The defendant moves the Court for an order setting aside the verdict and any judgment entered thereon and for judgment in accordance with the defendant's motion for a directed verdict presented at the close of the plaintiff's evidence and at the close of all the evidence and for the reasons stated therein.

In the alternative, the defendant moves the Court to set aside the verdict and any judgment entered thereon and grant the defendant a new trial on the following grounds:

1. The verdict was against the evidence.
2. The verdict was against the weight of the evidence.
3. The verdict was against the law applicable to the case.
4. The damages awarded were grossly excessive.
5. The verdict was influenced by wholly improper arguments of the plaintiff's counsel.

By his attorneys,

(s) THOMAS H. MAHONY

MEMORANDUM ON MOTION FOR NEW TRIAL OR FOR JUDGMENT N.O.V. FILED BY THE DEFENDANT.

July 2, 1956.

McCARTHY, D. J.

I have carefully studied the briefs filed by the parties in this case and have given thoughtful consideration to all the issues raised by these motions and the rights which were saved during the trial. It is my considered judgment that the motion for judgment n.o.v. is denied and the motion for a new trial filed by the defendant is denied upon the condition, however, that the plaintiff remit to the defendant the sum of $13,000. If this remittitur is not filed within twenty days of the entry of this order, then the order of the Court is that the motion for a new trial filed by the defendant is granted as to the issue of damages only.

PLAINTIFF'S REMITTITUR.

Now comes the plaintiff in the above entitled action and hereby remits to the defendant the sum of thirteen thousand ($13,000.00) dollars, in accordance with Order of the Court made on July 2nd, 1956.

(s) MICHAEL P. O'BRIEN
MICHAEL P. O'BRIEN, *Plaintiff*

By (s) REUBEN H. NITKIN
By virtue of Power of Attorney dated December 13, 1955, copy of which is attached hereto.

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS That I, Michael P. O'Brien, of Medford, in the County of Middlesex and Commonwealth of Massachusetts, have constituted, ordained and made, and in my stead and place put, and by these presents do constitute, ordain and make and in my stead

and place put Reuben H. Nitkin of 70 State Street, Boston, Massachusetts, to be my true, sufficient and lawful attorney for me and in my name and stead; especially authorizing him, my said attorney, to settle, compromise and adjust by any means whatsoever, either by instituting legal proceedings or otherwise, all claims, demands and causes of action that I may now have or hereafter have against Harold Hobart of Washington, D. C., arising out of a certain motor vehicle accident which occurred on June 21, 1952, on Route #2 in the Town of Concord, Massachusetts, and particularly with reference to the action presently pending in the United States District Court entitled *Michael P. O'Brien* v. *Harold Hobart*, Civil Action No. 52-741-M. I intend this power of attorney to be irrevocable.

Giving and hereby granting unto my said attorney full strength, power and authority in and about the premises to execute and deliver to said Harold Hobart full and final acquittance and discharge forever releasing said Harold Hobart from all liability on account of said accident.

In Witness Whereof I have hereunto set my hand and seal this 13th day of December in the year of 1955.

(s) Michael P. O'Brien

Witness:

(s) Eileen O'Connor

70 State St., Boston

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

I, JOHN A. CANAVAN, Clerk of the United States District Court, District of Massachusetts, do hereby certify that the following entries are on the CIVIL ACTION DOCKET, in the cause entitled:

C. A. 53 521-M.

HAROLD M. HOBART

vs.

JOHN G. DONOVAN

and

MICHAEL P. O'BRIEN

1953

May 8 Complaint filed. Summons issued.

27 Marshal's return of Summons, with service on May 12, 1953, filed.

June 5 Defendant's answer filed with certificate of service.

Oct. 7 Interrogatories by Plaintiff to defendant John G. Donovan, filed.

27 Application that defendant be defaulted for failure to answer interrogatories filed by plaintiff.

27 20 day order entered. Copies mailed.

Nov. 10 Defendant John G. Donovan's Answers to Plaintiff's Interrogatories, filed.

Dec. 22 Defendant John G. Donovan's Interrogatories to Plaintiff, filed.

1954

Jan. 29 Application of defendant Donovan that plaintiff be defaulted for failure to answer interrogatories, filed.

31 20-day order entered. Copies to counsel.

Feb. 9 Plaintiff's Answer to Defendant's Interrogatories, filed.

1955

Nov. 10 McCarthy, J. Trial by jury (with C. A. 52-741) begins. Jury empanelled. Francis P. Flynn, Foreman.

29 McCarthy, J. Jury trial continues. Plaintiff Hobart's Statement. Evidence. No. 5 Juror, Dorothy I. Farnham excused by agreement of counsel.

30 McCarthy, J. Jury trial continues. Evidence.

Dec. 1 McCarthy, J. Jury trial continues. Evidence.

2 McCarthy, J. Jury trial continues. Evidence.

6 McCarthy, J. Jury trial continues. Evidence. Plaintiff rests.

7 McCarthy, J. Jury trial continues. Evidence.

8 McCarthy, J. Jury trial continues. Evidence.

9 McCarthy, J. Jury trial continues. Evidence. Motion of defendant O'Brien et al for Directed Verdict filed. McCarthy, J. Decision reserved. Arguments to Jury. Charge to Jury. Case committed to Jury.

10 Verdict for defendants. Jury discharged.

Dec. 13 McCarthy, D.J. Deft. motion for summary judgment denied. Copies to counsel.

13 McCarthy, D.J. Judgment entered for defts. with costs taxed at $ Copies to Counsel.

16 Plaintiff's motion for a new trial filed with cert. of service.

1956

Jan. 31 Vols. 1-7 Steno. testimony filed.

Feb. 24 McCarthy, J. Hearing on pltf's motion for a new trial taken under advisement.

July 2 McCarthy, J. Memorandum on motion for new trial by the pltf. filed—motion denied.

20 Notice of Appeal filed by the plaintiff. Copy of n a mailed to Kenneth C. Parker, Esq.

1956

Parker Coulter, Daley & White, 22 Broad St., Boston.

20 Bond for Costs on appeal filed (Mass. Bonding as surety thereon).

27 McCarthy, J. Motion for enlargement of time for filing record on appeal allowed. (assented to)

27 McCarthy, J. Motion to consolidate cross action. (assented to) allowed.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the aforesaid Court at Boston, said District this 30th day of August, 1956.

[SEAL]

JOHN A. CANAVAN
Clerk

By: (s) ELEANOR F. TAYLOR
Deputy Clerk

PLAINTIFF'S COMPLAINT.

Jurisdiction is founded on diversity of citizenship and amount. The plaintiff is a citizen of the District of Columbia, and both defendants are citizens of the Commonwealth of Massachusetts. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

COUNT 1.

1. On or about June 21, 1952, the defendant, John C. Donovan, his agent, servant or employee negligently drove a motor vehicle on the public highway, to wit: Route 2, between Concord and Fitchburg, Massachusetts, against the plaintiff who was then driving on said highway.

2. As a result thereof the plaintiff's automobile and contents were demolished, the plaintiff was caused to sustain severe personal injuries, and suffered great pain of body and anguish of mind, and was put to great expense

for medicine, medical attention and nursing, both for himself and for his wife, a passenger in his car, and was for a long period of time unable to attend to the plaintiff's usual duties, all to the great damage of the plaintiff.

COUNT 2.

1. On or about June 21, 1952, the defendant, John G. Donovan, his agent, servant or employee wilfully, wantonly and recklessly drove a motor vehicle on the public highway, to wit: Route 2, between Concord and Fitchburg, Massachusetts, against the plaintiff who was then driving on said highway.

2. As a result thereof the plaintiff's automobile and contents were demolished, the plaintiff was caused to sustain severe personal injuries, and suffered great pain of body and anguish of mind, and was put to great expense for medicine, medical attention and nursing, both for himself and for his wife, a passenger in his car, and was for a long period of time unable to attend to the plaintiff's usual duties, all to the great damage of the plaintiff.

COUNT 3.

1. On or about June 21, 1952, the defendant, John G. Donovan, his agent, servant or employee drove a motor vehicle on the public highway, to wit: Route 2, between Concord and Fitchburg, Massachusetts, against the plaintiff who was then driving on said highway.

2. The said motor vehicle was illegally registered and a trespasser and a nuisance on the highway.

3. As a result of the operation of said motor vehicle, the plaintiff's automobile and contents were demolished, the plaintiff was caused to sustain severe personal injuries, and suffered great pain of body and anguish of mind, and was put to great expense for medicine, medical attention and nursing, both for himself and for his wife, a passenger

in his car, and was for a long period of time unable to attend to the plaintiff's usual duties, all to the great damage of the plaintiff.

COUNT 4.

1. On or about June 21, 1952, the defendant, Michael P. O'Brien negligently drove a motor vehicle on the public highway, to wit: Route 2, between Concord and Fitchburg, Massachusetts, against the plaintiff who was then driving on said highway.

2. As a result thereof the plaintiff's automobile and contents were demolished, the plaintiff was caused to sustain severe personal injuries, and suffered great pain of body and anguish of mind, and was put to great expense for medicine, medical attention and nursing, both for himself and for his wife, a passenger in his car, and was for a long period of time unable to attend to the plaintiff's usual duties, all to the great damage of the plaintiff.

COUNT 5.

1. On or about June 21, 1952, the defendant, Michael P. O'Brien, wilfully, wantonly and recklessly drove a motor vehicle on the public highway, to wit: Route 2, between Concord and Fitchburg, Massachusetts, against the plaintiff who was then driving on said highway.

2. As a result thereof, the plaintiff's automobile and contents were demolished, the plaintiff was caused to sustain severe personal injuries, and suffered great pain of body and anguish of mind, and was put to great expense for medicine, medical attention and nursing, both for himself and for his wife, a passenger in his car, and was for a long period of time unable to attend to the plaintiff's usual duties, all to the great damage of the plaintiff.

COUNT 6.

1. On or about June 21, 1952, the defendant, Michael P. O'Brien, drove a motor vehicle on the public highway, to wit: Route 2, between Concord and Fitchburg, Massachusetts, against the plaintiff who was then driving on said highway.

2. The said motor vehicle was illegally registered and a trespasser and a nuisance on the highway.

3. As a result of the operation of said motor vehicle, the plaintiff's automobile and contents were demolished, the plaintiff was caused to sustain severe personal injuries, and suffered great pain of body and anguish of mind, and was put to great expense for medicine, medical attention and nursing, both for himself and for his wife, a passenger in his car, and was for a long period of time unable to attend to the plaintiff's usual duties, all to the great damage of the plaintiff.

WHEREFORE the plaintiff demands judgment against the defendants in the sum of Twenty-five Thousand Dollars ($25,000.00) and costs.

By his attorneys,

(s) CHARLES M. EWING
HEMENWAY & BARNES
73 Tremont Street
Boston, Massachusetts

DEFENDANTS' ANSWER

First Defense: The defendants admit that the plaintiff is a citizen of the District of Columbia and that both defendants are citizens of the Commonwealth of Massachusetts. The defendants deny each and every other material allegation in the plaintiff's complaint.

Second Defense: The defendants say that the plaintiff was negligent and his negligence contributed to cause his alleged injury and damage.

Third Defense: The defendants say that the plaintiff was guilty of a violation of law which contributed to cause the injury or damage complained of.

(s) KENNETH C. PARKER
PARKER, COULTER, DALEY & WHITE

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF, HAROLD M. HOBART, TO BE ANSWERED UNDER OATH BY THE DEFENDANT, JOHN G. DONOVAN.

1. Please state your full name, residence address, business address, occupation and name of your company.
2. If you are a proprietor of this business, please state your percentage of ownership, and the names, addresses and residences and percentages of each and every other one.
3. Please outline the nature and operation of said business.
4. Have you made such inquiries of your agents, servants and attorneys as will enable you to make full and true answers to these interrogatories?
5. Please state whether on June 21, 1952 a truck belonging to you was involved in a motor accident?
6. If your answer to Interrogatory No. 5 is in the affirmative, please state:
   (a) The registration of your truck, giving state, number, year of registration and name in which registered.
   (b) The full name and address of the operator of said vehicle and his operator's license number.
   (c) The full names and addresses of any passengers riding in the truck at the time of the accident.
   (d) Whether or not, at the time of the alleged accident, the person operating said truck was authorized by you to do so.

(e) Whether or not, at the time of the alleged accident, the person operating said truck was employed by you.

(f) Whether or not, at the time of the alleged accident, the person operating said truck was operating the same for your purposes or on your business.

(g) Whether or not, at the time of the alleged accident, the person operating said truck was acting as your agent and within the scope of his authority.

(h) Please describe in detail what, if anything, the person operating the said truck did in an attempt to avoid the accident.

(i) Please describe fully and in detail just how the alleged accident occurred, in the order in which the events took place.

(j) Please state any acts or omissions of the plaintiff, if any, which the defendants claim contributed to the alleged accident.

(k) Please describe the exact point of the alleged accident, with particularity with reference to some fixed object, with positive means by which the spot may be identified.

7. If your answer to Interrogatory No. 5 is in the affirmative, please state:

(a) Whether as a result of such accident an automobile belonging to the plaintiff or his wife was damaged by your truck.

(b) Whether your truck was in collision with an automobile operated by the plaintiff or his wife.

(c) What part or parts of said truck were in contact with said automobile of the plaintiff or his wife.

(d) Please describe in detail what, if any, damage was suffered by your truck.

8. Have you or your agents or others in your employ at any time prior to the alleged accident attempted to "lay off" the defendant, Michael P. O'Brien.
9. If your answer to Interrogatory No. 8 is in the affirmative, please state the circumstances and the reasons for said O'Brien's retention.
10. Did you know or have any reason to know of any physical infirmities of the defendant, O'Brien?

By his attorneys,

HEMENWAY & BARNES

(s) CHARLES M. EWING

DEFENDANT JOHN G. DONOVAN'S ANSWERS TO THE PLAINTIFF'S INTERROGATORIES

1. John G. Donovan, 608 Huron Avenue, Cambridge, 151 Highland Avenue, Somerville; proprietor of Utility Oil Company.
2. I am sole owner.
3. Distributor of Asphaltic Road Materials (Bituminous Products.)
4. Yes.
5. Yes.
6. a) Mass. Reg. A35465; John G. Donovan, d/b/a Utility Oil Co.
   b) Michael P. O'Brien, 86 Kenmere Road, Medford. Lic. #579506.
   c) Joseph Mullaney, Helper, 17 Laurel Terr., Somerville.
   d) Yes.
   e) Yes.
   f) Operating for our business purposes.
   g) Yes.
   h) Applied brakes and pulled over to the right.

i) Going east on Route 2 in Concord, Mass., approximately 20-25 mph. when suddenly was hit on left front side of truck by car coming in the opposite direction.

j) I respectfully decline to answer on advice of counsel and would rely on such evidence as may be introduced at trial.

k) Main Street, Route 2, Concord, Mass.

7. a) Yes.

b) Yes.

c) Left front bumper and mudguard of the truck with left front of car.

d) Left front bumper and mudguard.

8. I decline to answer on advice of counsel that the answer would be irrelevant.

9. See answer #8.

10. I knew of no such infirmities. Whether the said O'Brien had any infirmities of which I had reason to know calls, I am informed, for a mixed conclusion of law and fact, and I respectfully decline to answer.

Somerville, Mass., 6 day of November, 1953.

(s) JOHN G. DONOVAN

Then personally appeared before me the above-named John G. Donovan and made oath that the above statements subscribed to by him are true, and those based upon information and belief he believes to be true.

(s) ROBERT J. MULDOON
Notary Public

DEFENDANT JOHN G. DONOVAN'S INTERROGATORIES TO THE PLAINTIFF

1. Please identify yourself fully, giving your full name, age, residence, business address, and occupation, and if married, give the name of your wife.

2. Please give as accurately as possible any and all ad-

dresses at which you have lived within five years prior to the date of these interrogatories, setting forth state, town or city, street and number.

3. Please describe fully and in complete detail all injuries which you claim you received or suffered from as a result of the accident referred to in your declaration.

4. If as a result of the injuries referred to in interrogatory No. 3, you received medical or any other treatment, please give:—

(a) the name and address of any and all persons or institutions from which you received such medical or other treatment;

(b) the approximate number of treatments so received, setting forth as accurately as possible the dates of the first and last treatment;

(c) the number of treatments received at the doctor's office or institution and the number at your home;

(d) an itemized account of all expenses incurred for the above referred to treatment.

5. If as a result of your alleged accident you lost any time from any occupation or employment which you may have then had, please state as accurately as possible:

(a) what your occupation was at the time of said accident;

(b) the full name and address of your employer;

(c) the dates on which or between which you were incapacitated, setting forth the date on which you first returned to work after your alleged accident;

(d) the average weekly income received by you from your work;

(e) the amount of financial loss suffered by you as a result of your incapacity to work.

6. If as a result of your alleged accident you were con-

fined to your house or your bed, please give as accurately as possible the dates between which you were confined:—

(a) to your home; (b) to your bed.

7. Please describe fully and in complete detail any and all injuries or injurious effects of your alleged accident from which you are now suffering, stating which if any will in your opinion be permanent, or if you have recovered please state the approximate date on which you recovered.

8. Please describe fully and in complete detail any illnesses, injuries, diseases, defects or operations in any way related to the damages which you allege you have sustained as a result of this accident which you may have had or suffered from,

(a) within two years prior to the date of your alleged accident;

(b) at any time after the date of your alleged accident not caused by or arising from the same, setting forth the dates upon which each of the above was had or suffered from.

9. If within five years you have made any claim against any person or corporation for any personal injury sustained or against any insurance company under any life, health, or accident policy for any personal injury or sickness, or incapacity please give as accurately as possible:—

(a) the nature of the injury or sickness or incapacity.

(b) the date upon which the injury was received or the sickness or incapacity began.

(c) the name of the person, corporation or insurance company against whom claim was made.

10. Please state in itemized form all expense or damage suffered by you or incurred by anyone as a result of

the accident described in your declaration, other than that set forth in your answers to the previous interrogatories.

11. Please describe fully and in complete detail how your alleged accident happened, stating what you did and what happened to you in the order in which such events took place.

12. Please state fully and in complete detail all that the defendant did or failed to do which in any way caused or contributed to cause your alleged accident.

By his Attorneys,
PARKER, COULTER, DALEY & WHITE

PLAINTIFF'S ANSWERS TO INTERROGATORIES PROPOUNDED BY THE DEFENDANT

1. Harold M. Hobart; 49; 5110 Manning Place, N.W., Washington 16, D.C.; 5402 Connecticut Avenue, N.W., Washington 15, D.C.; physician; Irma Belk Hobart.
2. For last five years at 5110 Manning Place, N.W., Washington 16, D.C.
3. Chest injury, fracture of costal border, right lacerated liver, contusion heart, exploratory laparotomy.
4. a. Emerson Hospital, Concord, Massachusetts
   Mass. General Hospital, Boston, Massachusetts
   Mary Fletcher Hospital, Burlington, Vermont

   Dr. William Waddell, Mass. General Hospital
   Dr. Gordon Myers, Mass. General Hospital
   Dr. William McDermott, Mass. General Hospital
   Dr. Burbank, Mass. General Hospital
   Dr. Carl Berg, 1835 Eye Street, Washington, D.C.

   b. Hospitalized at Mass. General Hospital June 21, 1952, to July 3, 1952;
   One office visit to Dr. Carl Berg;
   One office visit to Dr. W. Waddell;

One hospital visit, Mary Fletcher Hospital;

c. All of the above visits were at a hospital or doctor's office, no home visits.

d. Ambulance fee	$10.00
Mass. General Hospital	426.50
Mary Fletcher Hospital	10.00
Physicians fee	395.00
	$841.50

5. a. Physician, private practice.
   b. Self-employed.
   c. Total disability June 21, 1952 to August 5, 1952
   Partial disability August 5, 1952 to November 1, 1952
   Returned to part time work August 5, 1952
   Returned to full time work November 1, 1952
   d. $500.00
   e. Approximately $10,000
6. a. and b.
   I was hospitalized from June 21, 1952 to July 3, 1952 and was totally disabled thereafter until August 5, 1952. From July 3, 1952 to August 5, 1952, I was confined to bed at the home of friends. From August 5, 1952 to November 1, 1952, I was able to work only part of the time and was confined to my home for the remainder.
7. Incisional hernia and dislocated sterno-clovicular joint, permanent.
   Recovery complete on November 1, 1952 except for 2 disabilities as stated above.
8. a. none
   b. none
9. None, other than for this accident.
10. Automobile belonging to my wife was completely demolished and was replaced at a cost of $2,000.00.

11. Truck belonging to the defendant, John G. Donovan, and operated by the defendant Michael P. O'Brien, was approaching from the opposite direction. The car which I was driving, and which was owned by my wife, was travelling in our right hand lane. The truck turned into the lane in which I was travelling directly into my path. I applied the brakes but was unable to avoid the collision which took place in our right hand lane.

12. See answer to Interrogatory No. 11.

Signed under the pains and penalties of perjury:

(s) HAROLD M. HOBART

JUDGMENT

McCARTHY, D. J.

This cause having come on for trial before the court and a jury and the jury having rendered a verdict for the Defendants, it is hereby

ORDERED that judgment be and is hereby entered for the Defendants with costs taxed at $

DATED at Boston this thirteenth day of December, 1955.

By the Court:

(s) DAVID W. WALSH
Deputy Clerk

(s) WILLIAM T. McCARTHY
United States District Judge

PLAINTIFF'S MOTION FOR A NEW TRIAL

Now comes the plaintiff, Harold M. Hobart, in the above-entitled action and moves that the Court set aside the verdict of the jury returned herein on December 10, 1955, and the judgment entered thereon on December 13, 1955, and grant a new trial on the following grounds:

1. The verdict was against the evidence.
2. The verdict was against the weight of the evidence.

3. The verdict was against the law applicable to the case.
4. The verdict was influenced by wholly improper argument of defendants' counsel and of counsel representing the defendant, Michael P. O'Brien as plaintiff in the cross action tried together herewith.

By his attorneys,

HEMENWAY & BARNES

(s) PHILIP B. BUZZELL

MEMORANDUM ON MOTION FOR NEW TRIAL BY THE PLAINTIFF

July 2, 1956

MCCARTHY, D. J.

The motion for a new trial filed by the plaintiff is denied. I have come to this conclusion only after careful study of all the evidence and after a careful analysis of the arguments of counsel to the jury.

STENOGRAPHIC RECORD OF TRIAL.

[2] Court Room No. 5
Federal Building, Boston
November 29, 1955

• • •

Mr. Mahony: There was one matter you wanted to dispose of?

The Court: That's right. I can do it up here. Come up.

(Conference at the Bench:

Mr. Mahony: I am quite sincere and have a substantial argument to make and a brief to submit.

The Court: Can we go ahead until half-past eleven?

Mr. Prendergast: It should be taken up at the time the evidence is completed. You said it one time before.

The Court: Yes. I think I will take it up when the evidence is all in. On the other hand, I suppose Mr. Mahony's position is if that motion is acted upon favorably to him—

Mr. Mahony: Certainly. Motion to waive day of final motion—I can't read my writing. Motion to waive day of trial. That is the only note I have, but I remember Mr. Prendergast saying it ought to be outside the presence of the [3] Jury.

The Court: How long will it take?

Mr. Mahony: 15 minutes.

The Court: Can Mr. Prendergast go ahead and make his opening?

Mr. Mahony: That's all right.

Mr. Prendergast: I have a motion to increase my ad damnum so I am not going to mention much of it. I won't make much of an opening, anyway.)

(Further conference at the Bench.)

• • •

(Opening statements by Messrs. Prendergast and Buzzell.)

(Brief recess.)

JAMES F. O'HALLORAN, Sworn.

Direct Examination by Mr. Prendergast.

Q. Your name is what? A. James F. O'Halloran.

Q. Where do you live, Mr. O'Halloran? A. 20 Brier Road, West Roxbury.

Q. Where do you work? A. I work for the Commonwealth of Massachusetts, Traffic Division, Public Works Department.

Q. Their office is where? A. My office is located at 130 Third Street, East Cambridge.

Q. Does that Department keep track of the lines that are placed on the various highways throughout the state? A. In Middlesex County.

Q. Your department is Middlesex County only.

Mr. Prendergast: We don't disagree that this is Middlesex County, do we?

Mr. Mahony: We can agree on that, sure.

Q. Does your department have the plans that relate to the markings on the highway which is now Route 2A, which is the old Route 2, in June, 1952? A. No, we don't.

Q. That is, were there any plans made that month? A. No.

Q. Were there some plans made which are in your department which showed the markings on that highway previous to June, 1952? A. Yes, sir.

Q. Have you got that plan with you? A. I have.

Q. Have you also a plan with you that shows the markings on that highway after June, 1952? A. I have.

Q. You have them both? A. Yes.

Q. Have you also been summonsed to bring in with you

all documents, records, et cetera, in possession of your department [5] which relate to the markings on the highway at the Concord-Acton line, or thereabouts, as of June 21st, 1952? A. That is correct.

Q. And have you brought them? A. I brought all I had.

Q. Will you open them up? A. (Complying.)

Q. Have you done some work, for your own convenience, when you took the stand in relation to these plans; that is, within the last two or three days? A. Yes, sir.

Q. Have you drawn up a separate sheet or set for yourself? A. Yes, I thought it would be easier to read.

Q. Did you take that information you have on those two documents in front of you from the records that are right there? A. I did.

Q. Will you be kind enough to step down here and draw—first I will ask you, what kind of a highway was this Route 2 in June of 1952 near the Concord-Acton line? A. A 3 lane highway.

(Brief pause.)

Q. And what were the widths of the lanes? A. Approximately 10 feet.

Q. Do you know what the surface of the road was? A. Not at the time, no.

[6] Q. Will you step down now and put on the blackboard, following the plans you have or the copies that you have got? I am going to suggest that you call Concord the top of the board.

Mr. Mahony: This is as of June, 1952?

Mr. Prendergast: Yes.

A. Concord the top of the board?

Q. Yes, Concord the top of the board. All right, if it will be easier to have Concord at the bottom— A. Yes, it would.

Q. All right, put Concord at the bottom. A. I don't know whether I can get it all on this board or not. If I

started here—I made two of them, one for 1949 and one for 1954. If I divide this and go up, I could explain.

Mr. Mahony: I would assume we wouldn't want the 1954 plans. That is two years after the accident. Those in effect June, 1952.

Q. Are there plans there as of 1952?

Mr. Mahony: June 21?

Mr. Prendergast: Yes.

A. Well, I can answer that. This is what happened. In 1951 we had a change of standards. In 1952 the road was painted to the new standards.

Q. Draw the plan as of 1951. A. (Complying.) All you want is the white lines?

Q. The lines on the highway, yes. Is that complete? [7] Put a shoulder in over here which represents the outer edge of the road. A. (Complying.)

Q. What do you want to call this? The other edge of the road? A. Yes.

Q. The two straight lines are the right and left edges of the highway. Is that complete? A. Yes.

Q. Was there a no passing sign some place there? A. Yes, there was.

Q. Put it down.

Mr. Mahony: In 1951?

Mr. Prendergast: Yes. This is the plan as of—all right, go ahead. A. Well, facing eastbound traffic there is a no passing sign at 1 plus 70.

Q. Write in the words "No Passing". A. (Complying.) We had another one facing westbound traffic.

Q. Put it up there. A. This blackboard isn't long enough, so it is up on this side of the roadway at Station 13 plus 15.

Q. This line down here that goes north and south across the board is the Acton— A. Acton Concord town line.

Q. West is here, isn't it? [8] A. This is coming west.

Q. Put a "West" there. That is east, west, south. A. (Complying.)

Q. Then a line on the southerly side of the board represents the highway? A. That's right.

Q. The line on the extreme northerly side of the board represents the extremity of the highway? A. Yes.

Q. This dotted line in here on the northerly side of the road represents what? A white line painted on the highway? A. These marks are painted on the highway.

Q. These broken lines as well as the continuous line in here and in here, the markings or paintings right on the highway? A. That is correct.

Q. They are painted out in white paint? A. In white paint.

Q. How often do they paint it? A. At least once a year.

Q. What does this 10 plus 15 up here represent? A. That is 1,015 feet from the Acton-Concord town line.

Mr. Mahony: How much?

The Witness: 1,015 feet.

Q. What does that represent as far as this is concerned? This is a hill? [9] A. This is a hill.

Q. Does this represent— A. The top of the hill at Station 7 plus 20, it is the vertical curve, 5 per cent grade.

Q. Will you write in there "Top of hill", so that we will all understand it?

Mr. Mahony: 5 per cent grade?

The Witness: Yes, sir.

Q. Does this 7 plus 20 mean from the Concord-Acton line out to this, it is 720 feet? A. That is correct.

Q. Does this 3 plus 70 mean— A. Yes, 370 feet from the line.

Q. I notice this 3 plus 70 is right opposite a solid white line that begins on the southerly side of the highway and goes in an easterly direction. A. That is correct.

Q. Is that correct? A. Yes.

Q. Then I notice that, that solid white line beginning at the westerly end of it goes in an angle over across in a northwesterly direction until it strikes in the vicinity of a dotted line? A. That's right.

Q. Is that a solid line? [10] A. Yes, sir.

Q. Then we have that solid line running in a westerly direction a short distance; is that correct? A. Yes.

Q. Can you give the Court and Jury, if you will, and let's not—stand over there if you can—will you give the Court and Jury, if you can, the distance between the Acton town line and the beginning of the solid line on the southerly side of the road, which line then runs in an easterly direction? In other words, from here to here is how many feet? A. 370 feet.

Q. Can you give—

Mr. Mahony: That is to the end of the white line?

The Witness: This point right here.

Mr. Prendergast: The beginning of it.

Mr. Mahony: The beginning of it?

Mr. Prendergast: From here to the beginning of the solid white line. On the southerly side of the road. That is 370 feet.

Q. Can you tell us for what distance that solid line is solid, going in an easterly direction? A. 350 feet.

Q. In other words, all you have done is subtracted 370 from 720? A. That's right.

[11] Q. So that we have a solid line on the southerly side of Route 2 going in an easterly-westerly direction for a distance of 350 feet? A. Yes.

Mr. Prendergast: Any objection to putting in "350" there?

Mr. Mahony: Where?

Mr. Prendergast: (Writing on blackboard) I will rub it out if you want me to. All right?

Q. Now, what do these broken white lines represent on

the westerly side of the Acton-Concord town line? A. Those are passing lines.

Q. Are they lane divisions? A. Yes, they are.

Q. And there are three lanes on the highway, and each one is approximately 10 feet wide? A. That is correct.

Q. This represents a solid white line, likewise? A. That's right.

Q. Coming from 1015 on the blackboard, and which is on the northerly side of the highway? A. Yes, sir.

Q. Does the space between the solid white line on the right which continues up and down the blackboard in the northerly side, and the solid white line you have just described, represent a [12] lane? A. It does.

Q. Will you be kind enough to tell the Jury, if you will, the distance that that solid white line runs? A. It runs from 10 plus 15 to 7 plus 20, which is 295 feet.

Q. (Writing on blackboard) Now, let me see if I can approximate this correctly, too. Take this broken white line beginning on the northerly side of the highway, and which runs in an easterly direction. Until such time as that white line breaks off in a northeasterly direction, what is the distance? A. You mean from this point near the town line? 170 feet.

Q. From there to there represents the distance from here to here, which is 170 feet? A. That's right.

Q. Then we have a dotted white line and we have a solid white line which runs from the northerly side of the highway in a northeasterly direction until it strikes this solid white line opposite this mark, 370 feet. Can you tell us the distance of that line? A. That is 200 feet.

Mr. Mahony: From the town line?

Mr. Prendergast: No, from where it breaks off.

The Witness: That is the transition line. It is 200 feet.

Q. Does the transition line—is it what we refer to now as the [13] middle lane? A. Yes, it is.

Mr. Prendergast: Of the highway.

Cross Examination by Mr. Mahony.

X-Q. Have you, on your notes and this chalk on the board, the width from the northerly edge of the travelled part of the road to the southerly edge of the travelled part of the road? It is what? A. Approximately 30 feet.

X-Q. So that each of these lines marked out would be about 10 feet wide? A. Yes.

X-Q. Do I understand correctly the marks which you have on the board, that if an automobile was traveling westerly going from Concord to Acton, it would come to a point at 10 plus 15, or 1015 feet from the town line where it would keep to the northerly lane? A. That's right.

X-Q. Now, that is what that mark would indicate; is that correct? A. Yes.

X-Q. Then you would come to an area 3 plus 70, where the direction on the ground, on the road, would indicate that that automobile could continue along in the right northerly lane; correct? A. That's correct.

[14] X-Q. Or if it desired to pass another car where this broken line is on the transitional line, could cross into the middle lane to proceed? A. That's correct.

X-Q. Whereas an automobile traveling from Acton to Concord, as soon as it got 70 feet east of the town line it would be confronted with a transitional line which would direct it to keep in its furthest lane to the south? A. That is correct.

Mr. Prendergast: I object to that.

Mr. Mahony: He has said "That is correct." He has testified.

Mr. Prendergast: I raise the objection.

X-Q. There isn't any question, is there, Mr. O'Halloran

The Court: Do you want me to rule on that?

Mr. Prendergast: That is all right; I will take care of it.

X-Q. Is there any question that those solid lines indicate that an automobile traveling easterly is not to cross that solid line?

Mr. Prendergast: Wait a minute. Which solid line are you talking about?

Mr. Mahony: An automobile traveling easterly, when it meets the solid line 70 feet east of the town line, following that where it bears northeast 370 feet from the line and up to [15] where it ends, 720 feet from the town line, that a motor vehicle traveling east is not to cross that line?

Mr. Prendergast: Objection. It all depends, I assume, on where it has the right to start across.

The Court: I think I will exclude that.

Mr. Mahony: May I make an offer of proof?

Mr. Prendergast: I won't waste time with exceptions. I want to get through this trial here before this Jury, not upstairs.

X-Q. Is that right, Mr. O'Halloran? A. That is correct.

X-Q. And the purpose of the broken line, where it parallels a transition line, is that if an automobile is to pass another automobile traveling west, that broken line is an indication it can cross that solid line? A. That is correct.

X-Q. This top of the hill you refer to, at 720, was it? A. Yes, sir.

X-Q. That, you said, was a 5 per cent grade? A. That's right.

X-Q. That means 5 feet in 100 feet? A. It rises 5 feet in 100 feet.

X-Q. In other words, 100 feet along the road from the point of beginning of measurement it would go up 5 feet, and that is the extent of a 5 per cent grade? [16] A. Yes, sir.

X-Q. That degree of slope is measured from what base? A. From here to here?

X-Q. Yes. Where does the rise begin, in other words? A. I don't understand your question.

X-Q. You said this is a 5 per cent grade, if it is the top of the hill. Traveling westerly, where does the grade end and the road become level? A. I would have to go to a plan for that.

X-Q. Can you tell us with reference to the town line? Can you refer to a map that you have on the stand? A. Yes, I can.

X-Q. Will you do it, please? A. (Examining.) The grade ends at station 140 from Acton. So 400 feet from the Acton town line is the bottom of the hill.

X-Q. So that would be 100 feet—820 feet for the entire slope? A. That is correct.

Mr. Mahony: That is all.

Redirect Examination by Mr. Prendergast.

Q. Do you mind marking right down below the plan representing the beginning of the hill? Write in the words "Beginning of the hill." A. (Complying.)

Q. You were asked, Mr. Witness, by Mr. Mahony, something relative to what the lines indicate for cars coming east and [17] going west. A. That's right.

Q. The car coming east, assume it were operating along on the middle lane, as it came over the line, he would have the right to go how far before he would be compelled to go over onto the right lane? A. A distance of 300 feet.

Q. So that he would have, from the town line, a distance of 300 feet before he would be faced with the question of compelling him to be in this right lane? A. At this point.

Q. At that point there? A. That's correct.

Q. This line here apparently is indicated to be a warning to people coming off that they have to slow and go into line in view of this no passing sign? A. That's right. This

is a transitional line to take care of operators coming here to get sufficient distance to get into a single line here.

The Court: Have him tell the Jury what "transitional line" means.

Mr. Prendergast: Yes.

Q. Will you explain, please? A. In this particular case, a transitional line is the area in which we allow vehicles, as they approach a no passing area, we [18] allow them a certain distance to come into that single line. Instead of bringing the single line right down here, going from 3-lane to 2-lane highway, we give them a certain distance so they can get into that single line either way.

Q. Can you tell us what the grade is from this 1.30? What is that? A. That is 1.0.

Q. All right. From this 100 feet back from Concord on the Acton side, can you tell us what grade it is up to the Acton side? Up to the town line? In other words, is that a 5 per cent grade or not? A. Not at that particular point, no.

Q. Is there some way you could put a line here the whole length of the board and give the Jury an idea of what the grade is at different points? A. That would be pretty difficult to do on a blackboard.

Q. Let me ask you this: Maybe by referring to this plan you have here you might be able to tell the Jury by word of mouth what the grade is. Interpret this grade here as it is on your plan and describe it to the Jury. In other words, if you go 100 feet it does this, and if you go 200 feet it does this. Begin at the point where we have 1.0, 100 feet on the Acton side of the town line. A. All right. That is a very slight grade.

Q. How much does it rise in that 100 feet, if any? [19] A. It rises 22 100's.

Q. 22 100's of a foot? A. That's right.

Q. So that it is less than a fifth? A. Yes.

Q. So that it is barely perceptible? A. That's right.

Q. What is the next measurement from the town line? A. From the town line and 100 feet beyond the town line.

Q. Let's take 100 feet beyond the town line. The first 100 feet in Concord, what is the rise? A. 1.1 per cent grade.

Q. So that you are really only rising 1 foot in 100, aren't you? A. That's right.

Q. So that in that 200 feet you have covered in the road, you have gone only about a foot rise and a fifth; is that correct? A. That's right.

Q. About 14 inches. A. That's right.

Q. Go ahead. What is the next one? A. From 100 to 200 it is a 3.34 per cent grade.

Q. So that then rises 3 feet? A. 3.34 feet.

Q. All right. In that 100 feet? [20] A. That's correct.

Q. By that time you are almost up at the 370 mark, aren't you? A. No, you are at Station 2.

Q. Where is that? Right here? A. Right about here.

Q. Take us up to the middle of the hill, which is about here. What is the rise?

Mr. Mahony: Up to what station?

Mr. Prendergast: 3 plus 70.

A. Well, from 3 to 4 you have a

Q. That is from about here to about here.

Mr. Mahony: That would be from 200.

The Witness: No, from 3 to 4. From here approximately—this is not to scale. From here to another 100 feet, 3 to 400, 4.67 per cent grade.

Q. So it rises about a little bit better than 4½ inches in 100 feet? A. 4.67 or 57. It is 142.86 from 147.59, which is approximately 4.73 per cent grade.

Q. All right. At 400 feet. From that point to the top of the hill is another rise of how much? A. From station 4 to 5 it is 5.47 grade.

Mr. Prendergast: Thank you very much. Any more, Mr. Mahony?

Mr. Mahony: None.

[21] Mr. Prendergast: Thank you. You are all through. Mr. O'Brien, will you come forward? Take off your overcoat. Is there any objection to this man sitting down?

The Court: No, there isn't any. Turn the witness stand around.

MICHAEL P. O'BRIEN, Sworn.

Direct Examination by Mr. Prendergast.

Q. Please talk as loud as I do, and if you do I am sure nobody will have any trouble hearing you. Your name is what? A. Michael P. O'Brien.

Q. Your wife would never answer you if you had called that way. A. I don't have any.

Q. Talk up. A. Michael P. O'Brien.

The Court: Don't be afraid, Mr. O'Brien. Speak right up.

The Witness: I'm not afraid.

Q. Where do you live? A. 86 Kenmore Road, Medford.

Q. How old are you now? A. 72.

Q. How old were you in June of 1952? A. 69.

Q. In June of 1952 were you working for somebody? A. Yes.

[22] Q. Who? A. Utility Oil, Somerville.

Q. The Utility Oil Company, of Somerville? A. That's right.

Q. What was your job? A. Chauffeur.

Q. What kind of vehicle were you chauffeuring? A. Mack Distributor Truck.

Q. Is that a one body thing or is it a tractor-trailer? A. A single truck.

Q. It is a single truck? A. That's right.

Q. What kind of goods did it carry when it was filled? A. Asphalt.

Q. On the day the accident happened, it had nothing in it; is that right? A. It was empty.

Q. What was your physical condition on the morning of June 21, 1952? A. Very good.

Q. What was the condition of your voice? A. It was all right.

Q. How was it in comparison with its condition today? A. It was entirely different.

Q. On the morning of June 21st, 1952, you apparently went some [23] place and finally got up in Shirley, did you? A. Yes.

Q. Where is Shirley in relation to where this accident happened? A. It is about 16 or 17 miles from there.

Q. In what direction? A. Westerly.

Q. Apparently you were coming in the direction of Boston when the accident happened; is that right? A. That's right.

Q. Was there somebody working with you that day? A. Yes.

Q. Who was it? A. Joseph Mullaney.

Q. What was he, a helper? A. Yes.

Mr. Mahoney: What is his name?

Q. Joseph Mullaney, your helper? A. Yes.

Q. So you were driving the truck? A. That's right.

Q. Will you be kind enough to give the Court and Jury an idea as to the measurements of this truck? A. Well, it's approximately 27 foot by 8, 6.

Q. You mean 8 foot 6 inches? [24] A. That's right.

Q. And the length, 27, and the width, 8 foot 6 inches? A. That's right.

Q. What kind of a day was it? A. Very good day.

Q. About what time of day did this accident happen? A. Around 2 o'clock.

Q. As you were coming from Shirley towards Concord before the accident happened, at some time did some vehicle pull in front of you? A. Yes.

Q. Where, approximately, was it that this vehicle pulled in front of you? A. I should say about 1000 yards back of the line in Acton.

Q. What kind of vehicle was it? A. A small delivery truck.

Q. You have to talk up. Small delivery truck? A. That's right.

Q. Was there something in it? A. Yes, there was a carton in it.

Q. Could you see the truck and the carton in it? A. Yes.

Q. As you drove along in the direction of Concord from where you got behind this truck, did you see that box doing something at times? [25] A. Yes, it was bouncing all over the place.

Q. Let's get down to a point about an eighth of a mile, or thereabouts, from the Concord line as you are coming through Acton. Do you understand me? A. Yes.

Q. What kind of district were you in? A. Residential.

Q. How wide was the road? A. About 30 feet.

Q. And were there lanes on the highway? A. Yes.

Q. And as you came along and approached this boundary line here, were there any signs on your right? A. No.

Q. Were there any signs on your left? A. No.

Q. Was the road marked off something like the plan has it? A. Yes.

Q. On what side of the highway were you operating? A. On the right side.

Q. At about what speed were you traveling A. About 25 or 30 miles per hour.

Q. Were you behind that truck still? A. Yes.

Q. Will you tell us whether or not there was any other

ffic [26] ahead of that truck? A. Yes, there was quite a bit.

Q. About how far behind that truck were you as you were going along? A. Maybe 25 or 30 feet.

Q. As you approached this Concord line, did you see something in the highway in front of you that was unusual? A. Yes, there was construction there.

Q. Where was the construction going on? A. On my left, on the further lane.

Mr. Mahony: What is that, "further lane", did you say?

The Witness: Yes.

Q. That is on the northerly lane? A. Yes.

Q. Will you be good enough now to tell the Court and Jury approximately where, in relation to this line, this construction was going on? A. Well, it was right at the line.

Q. So that there will be no mistake about it, the construction is going on over here on the northerly lane as shown on the blackboard, right here in the vicinity of the town line? A. Yes.

Q. Will you describe to the Jury as best you can what this construction was that you saw? [27] A. Well, there was a couple of piles of earth there.

Mr. Mahony: Couple of piles of what?

Mr. Prendergast: Couple of piles of earth.

Q. You see, my brother is getting old, so just talk up. Don't make him tell you. Over in this vicinity was this couple of piles of dirt? A. Yes.

Q. Were the piles of dirt running in an east and west direction or running in a north and south direction? A. North and south.

Q. In other words, they were running across the highway. Were the piles of dirt completely in that first lane or partially in it? A. Partially.

Q. All right. Now, then, as you came along approaching

the Acton town line, on what side of the road did you say you were operating? A. On the right side.

Q. At some time, as you were approaching this line, did you see any traffic ahead of you? A. Yes.

Q. Where was the traffic? A. Right ahead of me.

Q. You saw the traffic was preceding you? A. Yes, sir.

[28] Q. What was the condition of the traffic going in the opposite direction, if any? A. There wasn't too much traffic in the opposite direction.

Q. Was there some? A. Yes.

Q. Where was it? A. I should say two cars coming toward me from the top of the hill.

Q. If this is the top of the hill, some place up in here? A. Yes.

Q. Were they heading toward Acton? A. West, yes.

Q. And on what part of the highway were they? A. They were on the right lane.

Q. You mean by that they were on the further lane, the left? A. That's right.

Q. After you saw them, or at the time you saw them, about what speed were you traveling at? A. I should say 25. About the same.

Q. Could you tell the speed of the other cars coming toward you? A. No.

Q. Why? A. I didn't pay too much attention.

Mr. Mahony: Wait a minute.

[29] Mr. Prendergast: Never mind.

Q. You couldn't tell the speed? A. I had trouble enough watching my own.

Mr. Mahony: May that be stricken?

The Court: Yes.

Q. After seeing those cars, did you then start to look ahead the way you were going?

Mr. Mahony: I submit he ought to let the witness testify and not continue leading questions.

Mr. Prendergast: I submit they are not leading, most of them. That one may have been.

The Court: Do you want to reframe that one?

Q. After you saw these cars coming towards you, where did you then look? A. I was watching that box in front of me on that truck.

Q. At this time was your car still moving, the truck you were in? A. Yes, it was.

Q. How far were you behind this truck? A. About 25 feet or so.

Q. Tell me something.

The Court: So there will be no misunderstanding on the record, Mr. Mahony, I allowed your motion to strike that answer and I asked Mr. Prendergast to reframe it. That is satisfactory to you, isn't it?

Mr. Mahony: Yes, sir.

Q. Now, about how fast were you traveling at about that time? A. About the same, about 25 miles.

Q. Did something happen to you after that? A. Why, yes, I saw this car out of the corner of my eye, coming towards me, and struck the front of my truck.

Q. Let's take our time. You saw a car coming towards you out of the corner of your eye? A. Yes.

Q. Will you point out just what you mean by the corner of your eye? A. I was watching ahead and out of the corner of my eye I saw the car coming towards me.

Q. You say you saw that car coming towards you? A. Yes.

Q. Did that car and your truck come in contact? A. Yes.

Q. Did you see the car and your truck come in contact? A. Yes.

Q. What part of the car came in contact with your truck? A. The left front.

Q. What part of your truck came in contact with the automobile? A. Left front wheel at the rear.

Q. The rear of the left front wheel? A. That's right. [31] Q. When that happened, what happened to you? A. Well, it pulled the wheel out of my hand and swung the truck completely around. It threw me down in the cab head first.

Q. Go ahead. A. And I don't know anything after that.

Q. Now, at some time after that you knew something? A. Oh, yes.

Q. What was the next time you knew anything? A. Well, I think it was in the hospital when they brought me to.

Q. Do you remember being in the Emerson Hospital? A. Yes, downstairs.

Q. Do you remember being at the scene of the accident before going to the hospital or, in other words, do you remember how you got out of the truck, whether you were pulled out or what? A. I have no idea.

Q. At any rate, then you remember of being in the Emerson Hospital? A. Yes.

Q. How did you feel? A. Not very good.

Q. That doesn't mean a single thing. If my wife asks me for a check, I don't feel good. Tell me how you felt with regard to pain and suffering. A. I had that awful pain in my side.

Q. Which side? [32] A. Left side.

Q. Did you have any other pains in any other part of your body? A. Both legs and arms were all scratched. My stomach.

Q. Go ahead. A. My head, my nose.

Q. What was the matter with your nose? A. It was broken.

Q. Go ahead; what else? A. Fracture, I guess. They said it was of my head.

Mr. Mahony: Will you strike that?

Mr. Prendergast: Strike out "fracture", leave that out. The hospital records will be here.

Q. Anyway, you were in the Emerson Hospital? A. Yes.

Q. Do you remember leaving the hospital? A. Yes.

Q. Who took you away from the hospital? A. Mr. Gleason.

Q. Was he somebody connected with Utility Oil? A. He was superintendent.

Q. What time were you taken away from the Emerson Hospital? A. I don't know exactly. Somewhere around 5 o'clock, I think.

Q. Then where were you taken? A. Home.

Q. What did they do for you in the hospital? [33] A. They just taped me up.

Q. Where did they tape you? A. My side.

Q. They just taped your side, or did they go all the way around the stomach? A. Just the side.

Q. The left side, from the way you are pointing? A. Yes.

Q. Then you went home? A. Yes.

Q. What did your face look like? Did you see it? A. It looked like a mess.

Q. "Mess" doesn't mean much. Were you black and blue, were you bloody, or what? A. I was all bloody, yes.

Q. Were you home a while, or some time, when something happened that night? A. Yes. I fainted, I collapsed.

Q. At home? A. At home.

Q. Was it from anything you were doing or something came over you suddenly? A. I went to sit down and I collapsed.

Q. Did a doctor come in to see you? A. Yes, the lady of the house called the doctor.

[34] Q. Who was the doctor? A. Doctor Baskies.

Q. As the result of Doctor Baskies' coming in to see you, were you taken some place? A. Yes, the Saugus General Hospital.

Q. How long were you in the Saugus General Hospital? A. Oh, about five weeks that first time.

Q. And then were you discharged? Were you? A. Yes.

Q. Well, you were in the first time; then were you taken back in another time? A. Yes.

Q. When were you there the second time? A. Oh, I don't know the date.

Q. How long after the first one, approximately? A. Gee, I don't know.

Q. How many times were you in there? A. Twice.

Q. Now, when you were in the Saugus Hospital, did you have another doctor besides Doctor Baskies? A. Oh, yes.

Q. Who was that doctor? A. Doctor Cotta.

Q. Did you have any other doctor while you were in the Saugus Hospital besides Doctor Cotta? [35] A. Yes, but I don't know their names.

Q. How did you feel the first day that you were in the Saugus Hospital? A. I don't know. They put me out.

Q. You mean they put you out of the building? A. No, they gave me a shot and put me out of commission.

Q. You were out of commission already, weren't you? A. Yes.

Q. Well, all right. You came to at some time? A. The next morning.

Q. What happened to you then? A. They took me downstairs, I believe, and took X-ray pictures.

Q. And then, after the X-ray pictures were taken, what else? A. They put me to bed.

Q. Then what did you do? A. I was under observation.

Q. What did they do each day, as best you can tell us, while you were there? A. The first thing they done, if I remember, they took that strapping off me. They took that off altogether. They didn't do much of anything else but give me sedatives to keep me quiet. That's about all.

Q. How did your stomach feel? A. All my stomach was paining, bad pains with my stomach, but it wasn't as bad as it was a little later.

[36] Q. Was there anything the matter with your stomach before the accident? A. No.

Q. Had you ever had a hernia? A. No.

Q. Had you ever had any stomach trouble at all by way of cuts in your stomach? A. Quite a number of years ago, I had an appendix operation.

Q. How long ago was that? A. Oh, I don't know. I think it was 1905 or '06, somewhere along there.

Mr. Prendergast: Oh, it was before I was born. (Laughter.)

Mr. Daley: Recess, Judge. (Laughter.)

The Court: What do you think of that, Mr. Mahony? I think it applies to either one of you.

Mr. Mahony: If I claim the year after Jack Benny, I am not kicking.

Q. Now, Mr. Witness, you were in there five weeks? A. Yes, sir.

Q. This Jury wants to know what happened to you in the five weeks. Will you tell them? A. I was under observation most of the time. They fixed my nose and they just kept giving me sedatives and so forth.

Q. How was your chest? [37] A. My chest was very sore, of course.

Q. How did it bother you? A. It pained.

Q. All right, tell the Jury how much pain and how it bothered you. A. How can I describe it? I can't describe it.

Q. Well, all right. How were you able to sleep? A. Oh, I had sedatives every night.

Q. Go ahead. Anything else? How were your knees? Did they bother you? A. Eat?

Q. Your knees. A. Oh, my k[illegible] yes. My legs were all swollen up.

Q. You went back home, apparently, after getting out of the hospital the first time, did you? A. That's right.

Q. How long did you stay there before you went back into the hospital? A. Oh, I think it was in January.

Q. When you were back in the hospital—

Mr. Mahony: January, 1953?

Mr. Prendergast: 1953, I presume.

Q. Is that right? A. Yes, 1953

[38] Q. When you went back in, what did you go back for? A. The hernia.

Q How many times were you operated on for your hernia? A. I was operated on first and then I had the blood clot and I had fluid in the stomach.

Q. Let's go back— A. So that there was three operations, really.

Q. At any rate, the second time you went back into the hospital was for what? A. For the hernia.

Q. Who operated on you for that? A. Doctor Cotta.

Q. Was it previous to this time that you had the tapping? A. What?

Q. In your back. Doctor Ferrand. A. Oh, that's right, when he tapped my back, yes.

Q. When was that? Before? A. No, I don't—I don't recall whether that was the second time. I think that was the second time I was in there.

Q. Besides being treated for your hernia, this Doctor Ferrand did something? A. Yes, he tapped me.

Q. Tell just what you mean by he tapped you. A. I had a punctured lung and there was fluid in the lung.

Mr. Mahony: Wait a minute. May that last be struck out?

[39] Q. You had something the matter with your chest? A. Yes.

Q. Tell the Jury how it was bothering you. A. Well, medical terms I don't know.

Q. You can't use medical terms. How was it bothering

you? Was it painful or could you breathe? A. It was hard to breathe and everything.

Q. Could you walk distances, or not? A. No, I couldn't walk at all, hardly.

Q. Did you feel strong or weak? A. Very weak.

Q. You were there when Doctor Ferrand [illegible]nictured you? A. Yes, I was in bed.

Q. Describe that occasion to the Jury. A. He took—two nurses were with him and they hold onto me and they took a needle and stuck it in my back.

Q. Did you see the needle that went in? A. No, I didn't.

Q. Did you feel it? A. I did, that.

Q. Did you see what they took out of your back? A. Yes, I saw what they took out.

Q. Tell the Jury what they took out of your back. A. Fluid.

Q. Describe it to the Jury. [40] A. Well, it looked like blood.

Q. Was it sort of yellowish or brownish or greenish? A. Kind of brownish color.

Q. How many times was that done to you? A. I think it was three times.

Q. You say it was painful? A. I'll say it was.

Q. Did it bother you very long? A. No, not very long, but long enough.

Q. You then were referred to somebody by Doctor Cotta, weren't you? A. Doctor Baskies.

Q. You first had Doctor Baskies, then you had Doctor Cotta while you were in the hospital. By the way, who operated on you for your hernia? A. Doctor Cotta.

Q. Then you had Doctor Ferrand? A. Yes.

Q. Did Doctor Cotta at some time, while you were being treated by him, send you to another doctor or to another hospital? A. Yes. Later.

Q. When was that? A. Oh,—

Q. Don't you remember? [41] A. No.

Q. Can you give the Jury approximately how long ago it was? A. Well, it was over two years.

(A brief pause.)

Q. Suppose I give you the date March 7, 1953. A. Yes, that's about it.

Q. Does that about tell you when you went to the Massachusetts Memorial Hospital? A. I went to Saugus and I was out almost a day and they took me right over to the Massachusetts Memorial Hospital.

Q: What did they do for you at the Massachusetts Memorial Hospital?

Mr. Mahony: W[redacted] you come to the Bench?

Mr. Prendergast: Surely.

(Conference at the Bench:

Mr. Mahony: This testimony is getting into what is termed a pulmonary infarct and the mere fact he goes to a hospital, unless there is something to connect it with this accident, of course, doesn't make the hospital record admissible. I am objecting to any statement as to what was done at the Massachusetts Memorial Hospital.

The Court: Are you going to connect it?

Mr. Prendergast: I certainly am, and I will have all the doctors here.

[42] The Court: Upon the premise it will be connected, I will admit it.

Mr. Mahony: And, if not, it will be stricken?

The Court: That's right.)

(Discussion off the record.)

(Luncheon Recess.)

[43] AFTERNOON SESSION.

(Conference in the Lobby.)

* * *

MICHAEL P. O'BRIEN, Resumed.

Direct Examination by Mr. Prendergast, Continued.

Q. Now, Mr. O'Brien, I am going to lead for just a minute. You went into the hospital in Saugus on the 21st of June, 1952; is that right? You stayed there five weeks and left there July 26, 1952; is that right? A. Yes.

Q. You then went home? A. Yes.

Q. And then did you keep having medical treatment from that time until you went to the Saugus Hospital? A. Yes.

Q. Again, for the second admission? A. Yes.

Q. Who was it that was taking care of you while you were between the two visits?

Mr. Mahony: While he was at home.

Mr. Prendergast: Yes.

A. Doctor Baskies.

Q. Then on January 4, of 1953, did you go to the Saugus Hospital for the second occasion? [44] A. Yes, I did.

Q. And then did you remain at the Saugus Hospital on the second occasion until March 6, 1953? A. Yes.

Q. Is that right? A. Yes.

Q. Then on March 7th of 1953 did you go to the Massachusetts Memorial Hospital? A. Yes, I did.

Q. Then, some time, April 13 or 14, in along there, were you discharged from the Massachusetts Memorial Hospital? A. Discharged?

Q. Yes, and I mean by that were you sent home from the hospital? A. No, I didn't come out of the Massachusetts hospital until I was all through over there.

Q. How long was that, then? A. That was in July, I think.

Q. Of 1953? A. 1954.

Q. Oh, 1954? A. Yes. I was there—I think it was 1954.

Q. I have the Memorial Hospital record. See if this refreshes your recollection, that you went down on the 7th of March, 1953, and you were discharged April 3, 1953. Do you remember that? A. Yes. Yes, yes.

[45] Q. Now, have you been receiving medical treatment from April 3 of 1953 right up to the present time? A. Yes.

Q. And you—who has been having you under his care for this medical treatment? A. Well, Doctor Baskies, and then I had to go back to the hospital once a month. Until 2 months ago I had to go twice a month.

Q. Who is the doctor that was treating you two months ago; let's get that? A. Well, that was the hospital.

Q. What doctor in the hospital? A. Oh, Doctor Soutter.

Q. When did Doctor Soutter start to treat you? A. Doctor Soutter operated on me and he treated me afterwards—

Q. No. When did he first see you, let's put it that way, if you remember it. A. I don't know.

Q. Have you any idea? A. Well, I had come back once a month after I left the hospital for examination and for treatment, and he has been treating me ever since.

Q. Did he operate on you? A. Yes.

Q. How many times? [46] A. How many times did he operate?

Q. That's right. A. Just the once.

Q. And when was that? A. Oh, I don't remember the date.

Q. Approximate date. A. I can't recall the date, whether it was 1953 or 1954.

Q. All right. When was the last time you saw Doctor Soutter? A. Last Friday.

Q. How long were you in the hospital last Friday? A. About four hours.

Q. Let me ask you this—

The Court: Where is the Massachusetts Memorial Hospital?

Mr. Prendergast: Near Boston City, on Harrison Avenue. Just this side of Boston City.

The Court: Is it part of one of the big hospitals?

Mr. Prendergast: No, it is a hospital of its own. It is its own corporation.

Q. So, from the date of this accident, up to the present time, you have been under constant medical treatment; is that so? A. That's right.

Q. And you have given us the names of all hospitals, in the meantime? A. Yes.

[47] Q. Let's go back for one minute. Were you in another automobile accident in November of 1953, I think it was? A. Yes.

Q. Were you injured in that accident? A. No.

Q. Did you have any kind of personal injury, of any kind or nature, as a result of that accident? A. No.

Q. Did any doctor, in any way, shape or manner, treat you because of that accident? A. No.

Q. All right. Now, you were making how much a week at the time that this accident occurred? A. It averaged $99.

Q. $99 a week. Have you worked from the date this accident happened up to the present time? A. No.

Q. Are you able to work at the present time? A. No.

Mr. Mahony: Objection.

Mr. Prendergast: Well, all right.

The Court: That may be—

Mr. Prendergast: All right.

Q. Tell us how you feel as of the present time? A. Well, I don't feel very good.

[48] Q. That doesn't mean a thing. A. I still have pains in my legs and in my side.

Q. How did your legs bother you after the accident? A. They threw out. I wasn't able to walk.

Q. How long did that condition exist? A. Up until about three months ago my legs were bothering me and now they are getting pretty good, they don't swell so much.

Q. How do you sleep? A. I don't sleep. I take sedatives every night.

Q. Tell us what time you get up in the morning? A. Well, sometimes 10 o'clock, half-past 10.

Q. And is there some reason why you stay in bed that late? A. Yes, the doctors told me to get all the rest I possibly could.

Q. I will go back to the accident for a minute, if I may. When this accident occurred, you said you were on the right hand side of the street? A. That's right.

Q. Can you tell the Court and Jury approximately how far from the right hand edge of the street the right side of your automobile was when the accident occurred? A. Oh, may be a foot to 18 inches.

Q. That would put the left side of your automobile how far from the edge of the road? A. From the outside edge?

[49] Q. From the outside edge on the right hand side. The left side of your automobile would be about how far from the right hand edge of the street?

Mr. Mahony: The right hand side of his automobile.

Q. The left side of the truck from the right side of the road. A. That would be about 10 feet.

Q. We haven't as yet, as far as I know, found out where the accident happened. Did the accident happen in Acton or in Concord? A. Well, it is right on the line.

Q. All right. Did it happen right near where the dirt was on the Acton side or the Concord side of the dirt? A. The Concord side of the dirt, just beyond the dirt pile.

Q. How far beyond the dirt had your truck gone when the accident occurred, in your opinion? A. Oh, maybe 60 or 70 feet.

Q. And at the time it happened, you say you were on the right hand side of the road? A. That's right.

Mr. Prendergast: I guess that's all.

Cross-Examination by Mr. Mahony.

X-Q. Mr. O'Brien, did I understand you correctly to say that, in reply to your counsel this morning, there was some traffic ahead of you going in the same direction that you were? A. That's right.

[50] X-Q. And that there was little, if any, traffic, not too much traffic, I think you said, coming in the opposite direction? A. That's right.

X-Q. And that you then saw two cars coming over the top of the hill? A. That's right.

X-Q. You don't want to change that in any way at all? A. No.

X-Q. Did you hear Mr. O'Halloran testify this morning? A. Yes.

X-Q. And at the top of the hill from the bottom of the hill, from about 100 feet west of the Concord-Acton line, the top of the hill is about 832 feet from the bottom? A. Yes, sir.

X-Q. So that, as you want to leave it with the Jury, you saw these two cars some 832 feet, or thereabouts, away from you? A. Yes.

X-Q. Is that right? A. That's right.

X-Q. So that they were coming towards you? A. Yes, sir.

X-Q. But paid no attention whatever to them? A. No, sir.

X-Q. After seeing them 832 feet away, you don't want to change that, in any way?

[51] X-Q. You didn't look at either one of them again; correct? A. That's right.

X-Q. And didn't see the second car again, I suppose? A. I didn't pay too much attention to it.

X-Q. Am I right, also, in understanding that you said when this first contact with the O'Brien car, that you were down on the gears, thrown down on the gears? A. Well, after he hit me, yes, I was thrown down in the cab.

X-Q. And saw nothing? A. Nothing.

X-Q. So from the time of the contact with the Hobart car you didn't see that second car again at all, did you? A. No, I did not.

X-Q. Are you sure of that? A. Yes.

X-Q. You don't want to change that in any way? A. No, I don't.

X-Q. Mr. O'Brien, within some four or five days after June 21, 1952, you had consulted an attorney, hadn't you? A. Yes, sir.

X-Q. And that attorney's name was what? A. Mr. Nitkin.

X-Q. Is he here in court? A. Yes, sir.

X-Q. Where is he? [52] A. He is seated right over there.

The Court: Who?

Mr. Mahony: Mr. Nitkin. (Indicating.)

X-Q. From that day when you first saw him, up to the present, you have been, so to speak, under his advice and legal care? A. Yes, sir.

X-Q. And you knew that he brought suit for you in Cambridge, did you not, against the Whitneys; yes? A. Yes.

X-Q. For a collision with the Whitney car on that very day; correct? A. Yes.

X-Q. I am going to show you this paper, and is that your signature? A. Yes, sir.

X-Q. And above, the answers are made under pains and penalties of perjury this sixth day of June, 1953; correct? A. Yes.

X-Q. No. 5, please state specifically and in detail the entire description of this accident, giving such detail related to

said accident and stating in detail how it happened. And you said, did you not, I was proceeding on Route 2, Concord, in the general direction of Boston. The truck I was operating was about 25 feet to the rear of the vehicle ahead of me, traveling in the same direction, when my truck was suddenly struck. The [53] defendant, coming from the opposite direction, came over onto my side of the road and his vehicle collided with the truck I was operating. The next, Question No. 6—

Mr. Prendergast: Let's get an answer to that.

Mr. Mahony: I just read the answer.

Mr. Prendergast: Let's get his answer, whether he said it or not.

Mr. Mahony: May I continue with my examination?

X-Q. (Continued.) The next question, No. 6. When did the operator of the plaintiff's automobile first see the defendant? No. 6, the answer, I first saw the defendant when he came down the dowingrade in my direction. No. 7, what part of the automobile owned or operated by the plaintiff collided with the defendant's car? Left front and forward left side. That is what you said under oath with reference to your collision with the Whitney car; isn't it? A. With the Whitney car?

X-Q. Yes. A. I don't remember saying anything like that.

X-Q. Middlesex, ss., Superior Court, 183848, Michael P. O'Brien against Robert L. Whitney. Have you any question that is what you said under oath? A. If it is there, I must have said it but—

X-Q. No "buts"—that is what you said, isn't it? You tell the Jury you didn't see that Whitney car for some 832 feet [54] after you saw it on the top of the hill? A. That's right.

X-Q. And you were completely out and never saw it?

Mr. Prendergast: That is what he has said here, Your Honor. He is not contradicting it.

Mr. Daley: I object to the last question, may it please the Court, because this witness has not yet said this car was 832 feet or anything like it at the time of the collision, between him and Hobart, and that he was out during that last distance.

X-Q. Let me go back. Did you say you saw the two cars at the top of the hill? A. Yes, I did.

X-Q. Did you say that you agreed in substance with Mr. O'Halloran that the top of the hill was 832 feet? A. Yes.

X-Q. And that that was about the distance you saw the two cars, when you first saw them? A. Yes.

X-Q. And that you didn't see the Whitney car again after that? Didn't you tell the Jury that, within 5 minutes. A. No, I don't remember seeing the Whitney car after that.

X-Q. That is what you told the Jury, isn't it, that after you saw him at the top of the hill, that you didn't see the Whitney car again? [55] A. That's right.

X-Q. In this O'Brien case against Whitney, your attorney was Mr. Nitkin, was it? A. That's right.

X-Q. And the suit was brought against Whitney for the injuries which you received on June 21, 1952; right? A. I don't know.

X-Q. You don't know? A. No. I think there was a suit pending—

Mr. Prendergast: Don't answer. Keep quiet, now. You will get plenty of time.

The Court: Is Whitney the driver of the second car?

Mr. Prendergast: That's right; yes.

The Court: The Whitney case isn't before this court?

Mr. Prendergast: No, because he is a resident of Massachusetts.

Mr. Mahony: The Whitney case is still pending in Massachusetts.

Mr. Prendergast: It couldn't be brought in here.

Mr. Mahony: That is still pending in Middlesex.

The Court: This Court gets jurisdiction on the theory of diversity. Where two persons live in the same state, this court can't take jurisdiction because you can't confer jurisdiction on the United States Court. Jurisdiction is always open as a defense, and it is the obligation of a judge of [56] this court to see to it that jurisdiction isn't accepted, so even if counsel agree, no judge would have a right to join these cases and have them tried together in this court. It couldn't be done, so the Whitney case is not before this court.

X-Q. Now, let me read to you the declaration which is filed by Mr. Nitkin in that case.

Mr. Prendergast: Wait. I object to that.

The Court: I think I will exclude that, Mr. Mahony.

Mr. Mahony: May I make an offer of proof?

The Court: Surely.

(Conference at the Bench:

Mr. Mahony: Not in the case being tried, but pleadings in another case don't come within that rule.

The Court: But it is still pleadings.

Mr. Mahony: The defendant offers to show that in the case of O'Brien against Whitney, 183848, Middlesex, in the declaration filed on April 6, 1953, the plaintiff claimed that the defendant so negligently and unskillfully drove a motor vehicle on a public highway called Route 2, Concord, Mass., on the 21st day of June, 1952, and by reason thereof said motor vehicle struck the motor vehicle in which the plaintiff was then properly riding along said highway, and as a consequence of which the plaintiff was seriously and permanently injured.

[57] The Court: Let it be made clear on this record, Mr. Mahony, that I am not excluding you from the right to show the Whitney car was in collision with

this man's car, but I am excluding it because this is only a declaration which is part of the pleading and which couldn't be considered as admissible testimony, but I still want it understood I am not foreclosing you from the right, through testimony on this witness stand, to prove that it was the Whitney car rather than the O'Brien car.

Mr. Mahony: I am not going to undertake to prove that there was no collision with the O'Brien car, but I am going to undertake, and the evidence will show, this fellow collided with both the Hobart and the Whitney cars.

Mr. Prendergast: I said that in my opening, that both cars struck the truck.

Mr. Mahony: This is offered with reference to the credibility of the plaintiff.

The Court: I will exclude it and save your rights.)

The Court: The Jury may disregard that last question, which is excluded.

Mr. Mahony: With reference to the declaration?

The Court: That's right. It is excluded.

[58] (Brief pause.)

Mr. Mahony: There is no need of putting Mr. Berger on the stand to authenticate those papers?

The Court: No. You will agree on that?

Mr. Prendergast: Surely.

X-Q. Now, Mr. O'Brien, you say there was a truck ahead of you? A. Yes, sir.

X-Q. Traveling in the same direction? A. Yes, sir.

X-Q. What kind of a truck was that? A. Small delivery truck.

X-Q. And any signs on it that you noticed? A. No, I didn't.

X-Q. That was within 25 feet of you? A. About that, yes.

X-Q. Did you get the name either of that truck or of the person who was driving it? A. No, sir.

X-Q. Open back, was it? A. Yes, sir.

X-Q. Now, this carton you say you saw on the truck, how big was that carton? A. Well, it might have been 2 feet long by 15 or 16 inches wide and probably 14 or 15 inches—

X-Q. 3 feet long? [59] A. Two.

X-Q. Two feet long; by that you mean 2 feet high? A. Well, it was oblong.

X-Q. Yes. A. And about 15 or 16 inches wide and about the same depth.

X-Q. 15 or 16 inches, one dimension? A. Yes, sir.

X-Q. 15 or 16 inches the other dimension—

Mr. Prendergast: High. Depth, he said.

X-Q. So it was 15 or 16 inches deep? A. That's right.

X-Q. So that it was lying on its long dimension on the floor of the truck? A. That's right.

X-Q. Tail board of the truck up? A. Yes, sir.

X-Q. How high was the tail board? A. I don't know.

X-Q. 15 or 16 inches? A. It could be.

X-Q. So that, as I get it, here was a truck with a tail board 15 or 16 inches high, possibly? A. Yes.

X-Q. And a carton inside the truck? A. Yes, sir.

[60] X-Q. That was no more than 15 or 16 inches high from the floor of the truck? A. That's right.

X-Q. So that the top of the carton was no higher than the top of the tail board, was it? A. Approximately, it was the same.

X-Q. Do you mean to tell the Jury you were watching that carton bouncing around? A. Yes, it was going back and forth across, from one side of the truck to the other.

X-Q. Just bouncing around? A. Yes, sir, up and down.

X-Q. Didn't it occur to you it was going to bounce out of the truck, did it? A. It might have.

X-Q. Was that what attracted your attention? A. Yes.

X-Q. This was a fairly smooth road? A. Yes, sir.

X-Q. State highway? A. Yes.

X-Q. You tell the Jury that that carton was bouncing 15 or 16 inches off the floor? A. I didn't say.

X-Q. If it were to come out over the tail board, it would have to [61] bounce 15 or 16 inches, would it not?

Mr. Prendergast: Isn't that argument?

A. I don't know.

X-Q. Is that what you want to tell the Jury, why you didn't see oncoming cars?

Mr. Prendergast: He said he saw them.

A. I saw them.

X-Q. You said you saw them as they came over the top of the hill? A. That is right.

X-Q. And didn't see them again until just before contact, when you saw out of the corner of your eye? A. That's right.

X-Q. During the time they were traveling downhill, you want the Jury to understand it was your interest in the carton that kept your eyes? A. It was the traffic and the carton.

X-Q. This is the first time in any court, in any part of this proceeding, that you have told this story about any carton on the truck ahead?

Mr. Prendergast: It isn't a story; it is evidence.

X-Q. That you made this statement about a carton on the truck ahead, this is the first time you told it, isn't it? A. Yes, I believe it is.

X-Q. On the deposition which was taken, you said nothing of seeing any carton on a truck ahead, did you?

[62] Mr. Prendergast: Wait. Have you got the deposition?

Mr. Mahony: Yes.

X-Q. You said nothing in a deposition, did you, about

seeing any carton on a truck ahead? A. I don't know. I don't remember.

X-Q. You just said this is the first time you said it in any proceeding, isn't it? A. Okay, I'll take it.

X-Q. And it is testimony you gave—there is testimony in another court that you gave, wasn't there? A. Yes.

X-Q. You said nothing in that court about seeing any carton on a truck, did you?

Mr. Prendergast: Does it show he was asked?

Mr. Mahony: May I have my question?

The Court: You may have it.

A. I don't remember saying it.

X-Q. And you talked with the police, the State police, after this accident, didn't you? A. In the hospital.

X-Q. Yes.

Mr. Prendergast: Wait a minute.

Mr. Mahony: Are you saying that to me?

Mr. Prendergast: No, I am talking to my friend.

Mr. Daley: I haven't said a word.

[63] Mr. Prendergast: You are mumbling under your breath.

X-Q. You never told the State police when they asked you about the accident—.

Mr. Daley: I pray your Honor's judgment, in that form. If he has some contradictory evidence of what this witness said, he may show it.

Mr. Prendergast: That is what they call the negative pregnant, isn't it.

The Court: Are you referring to something, the phrase that was used in a certain case?

Mr. Prendergast: That's right, and shouldn't have been.

The Court: Do you know what it means?

Mr. Prendergast: No, and I don't think they do, either.

The Court: Well, let's have the question.

(The question is read.)

The Court: I exclude that.

X-Q. Let me get at it this way: You say you talked with the State police after the accident? A. Yes, sir.

X-Q. Do you remember the name of the police officer or officers? A. I do not.

X-Q. Did he, or they, ask you how the accident happened? A. I believe they did.

[64] X-Q. You didn't tell him or them—

Mr. Prendergast: That I object to, again.

Mr. Daley: I make the objection for the same reason.

Mr. Mahony: I will press it and offer to make an offer of proof.

The Court: I will exclude it in that form.

Mr. Mahony: I will show he was asked how the accident happened.

The Court: They are objecting to the form in which it was put. Put it in another form.

Mr. Mahony: I would like to press it and make an offer of proof.

(Conference at the Bench:

Mr. Mahony: I offer to show that the State police officer Souza asked this man how the accident happened and this man made a statement to him, told him he didn't see any car approaching, and said nothing whatever with reference to seeing a carton bouncing around in a truck ahead.

Mr. Prendergast: That doesn't prove anything.

The Court: If he denied he had ever said that, I would permit it.

Mr. Prendergast: That would be different, but he hasn't denied he said it.

Mr. Mahony: He said this is the first time he mentioned it.

[65] The Court: If they asked him the question and

he said no, then I would admit it. I think I will exclude it.

Mr. Mahony: And my rights are saved?

The Court: Yes. I am not excluding the testimony of the witness under oath, of the officers.)

The Court: Don't have any misunderstanding, please. When Mr. Mahony—that is a perfectly proper and laudable way to present evidence. That is the way it ought to be presented. Counsel have a right to make an offer of proof, and it is made up here at the Bench and then it is discussed and it is admitted or it is excluded, and when that procedure is followed you can be sure that you are having a proper administration of justice, so whatever counsel do is perfectly proper. Each one does what he feels he should do in conformity with the obligation he owes his client. Don't form any prejudice one way or the other. All right, Mr. Mahony.

X-Q. Mr. O'Brien, when the police officer asked you what happened, you told him this, did you not: I was traveling east on Route 2 at an estimated speed of 25 or 30 miles an hour on the right lane. I did not see any incoming traffic or notice anything unusual. That is what you told the police officer, wasn't it? A. Maybe. I don't know.

X-Q. What? A. Maybe. I don't know.

[66] X-Q. You said in another court, did you not, that that is what you told the police officer? A. Yes. Maybe that's what I told him, but I don't remember it.

X-Q. You don't say you didn't tell him that, do you? A. No, I don't.

X-Q. And what you told him on that day you intended to be the truth, did you not? A. I hoped it was the truth.

X-Q. I think you said the dimension of your truck was 27 feet long? A. Yes, sir.

X-Q. By 8½ feet wide? A. Yes, sir.

X-Q. What was the weight of that truck? A. Well,

empty I think it weighs around 20,700. That I am not sure of.

X-Q. Something over 10 tons? A. That's right.

X-Q. And you were traveling along at 25 to 30 miles an hour? A. Yes, sir.

X-Q. And this other car that the Hobarts were in was what, a Chrysler car? A. I don't know.

X-Q. It was a pleasure car? A. Yes, sir.

[67] X-Q. And you say that that car came in contact with your truck and changed the course of your truck? A. Yes, sir.

X-Q. And changed the course of your truck in what way? A. Well, when it hit the left front wheel of the truck, it threw the wheel out of my hand and threw me.

X-Q. Changed the course of your truck in what way; that is what I am asking. A. By turning to the left.

X-Q. So, immediately on contact with the Hobart car, your truck was turned to the left? A. That's right.

X-Q. At what angle was it turned to the left? A. I don't know exactly what the angle is; but it is a very sharp angle.

X-Q. So that from that time on your truck, after it went left, was no longer on the right lane? A. No, it wasn't.

X-Q. Was it in the middle lane? A. It was right up against the fence, as far as I know.

X-Q. So that it was on the far north lane? A. That's right.

X-Q. The brakes on that truck were of what type? A. Air brakes.

X-Q. Traveling at 25 miles an hour on that road, dry pavement, clear weather, in what distance could you have stopped your [68] truck if you wanted to? A. Oh, maybe 10 or 15 feet.

X-Q. And at no time prior to the actual collision did you attempt to stop your truck, did you? A. No, sir.

X-Q. So far as the roadway is concerned, the lanes were about 10 feet wide? A. That's right.

X-Q. I think you said there was a pile of dirt that you saw? A. Yes, sir.

X-Q. How big a pile of dirt was that? A. Quite a good-sized pile.

X-Q. Can you describe it, the dimensions? A. It might have been 4 or 5 feet high. It spread out on part of the—well, the north lane.

X-Q. It was over in the north lane? A. Yes.

X-Q. And that was the only pile of dirt that you saw there? A. I think there were two.

X-Q. Where was the second? A. Just beyond it a way. I don't know how far.

X-Q. When you say "beyond it", you mean to the east or to the west? A. It could be either.

X-Q. Well, there are two piles of dirt, as you remember? [69] A. Yes.

X-Q. And you had passed both piles of dirt before the accident? A. Yes, sir.

X-Q. So that in going east; the two piles of dirt were over on the north lane and you passed both of them before this collision took place? A. Yes, sir.

X-Q. You don't want to change that in any way? A. No, sir.

X-Q. I think you said you had somebody on the truck with you? A. Yes, sir.

X-Q. Who was the helper? A. Yes, sir.

X-Q. His name was what? A. Joseph Mullaney.

X-Q. He was employed by the Utility Oil Company, too? A. Yes, sir.

X-Q. Do you know where he lives? A. He lives in Somerville. I don't know the name of the street.

X-Q. Is he still alive and around? A. Yes, sir, he is in court.

Mr. Prendergast: That is a surprise. Don't spring those.

X-Q. You have said at one time, did you not, that the Hobart car [70] was in its own lane, the center lane?

Mr. Prendergast: No, he said in the right lane.

Mr. Mahony: May I have my question?

Mr. Prendergast: Well, I object to your misleading him. I think you should quote testimony correctly.

Mr. Mahony: I am not quoting the testimony he has given here today.

X-Q. You have said, at one time, have you not, that the Hobart car was in its right lane, in the center lane, have you not? A. I said the right lane.

X-Q. Was it in its right lane? A. Yes, that's right.

X-Q. And that, at the time of the collision? A. No, not at the time of the collision.

X-Q. Haven't you said it was in its own right lane at the time of the collision? A. He couldn't be.

Mr. Mahony: No, may that be struck out?

The Court: It may.

X-Q. Do you remember your deposition being taken on February 28, 1953? A. Yes, I think so.

X-Q. Samuel H. Cohen and Ruben Nitkin represented you in that deposition? A. That's right.

[71] X-Q. I am reading from page 56.

Mr. Prendergast: Who is interrogating?

Mr. Mahony: Mr. Lobdell.

Mr. Prendergast: And he was representing you?

Mr. Mahony: That's right, representing the defendant in this case.

X-Q. (Reading) "At the time of the collision the defendant's car, the Chrysler, was within the two white lines of the traffic lane in which it was traveling, was it?" "Yes, I think it was," was your answer, wasn't it? A. That's right.

X-Q. Do you remember also testifying in court on August 14, 1952, out at Concord?

Mr. Prendergast: Wait. Will you step to the Bench, please?

(Conference at the Bench:

Mr. Prendergast: We don't even know what her standing is in court, whether she is a court reporter or what her experience is. They don't allow her in the Superior Court, until they satisfy the Judge they have a court reporter of recognized authority.

Mr. Mahony: I am going to ask him if he didn't say these things.

Mr. Prendergast: He shouldn't be allowed to wave these papers in front of the Jury. It is a different thing if you have a court stenographer of [72] recognized ability.

The Court: I think there is a difference between one who is a court reporter—

Mr. Mahony: She does a tremendous amount of it and if he denies it, I am going to have her here. These are questions put by Judge Northrop.

The Court: Was this a criminal proceeding?

Mr. Mahony: Yes.

The Court: Against whom?

Mr. Mahony: Against this fellow.

Mr. Prendergast: He was accused of violating in traveling over a line that wasn't there.

Mr. Mahony: This is an examination of Mr. O'Brien by the Court with reference to just this situation.

The Court: Do you want to pass it over and ask him if it refreshes his recollection?

Mr. Mahony: No. I am going to ask him if he didn't say these things in Court.

Mr. Prendergast: The legality of these lines have been shown to you now.

The Court: I don't want anything in here which deals with collateral matter—

Mr. Mahony: That is not collateral, that is admissions.

The Court: He used the phrase "District Court"—

[73] Mr. Mahony: Nothing as to what happened to him out there.

Mr. Prendergast: It is in the back door.

The Court: I think I will exclude it. I will permit you to give it to him to refresh his recollection but I don't want to have creep into this case any criminal proceeding in another court.

Mr. Mahony: I offer to show that the Court, Judge Northrop, on August 14, 1952, asked this witness: "Did you tell the officers that you didn't see any oncoming traffic?" And that he answered, "That is right." Question by the Court: "You meant by that that you didn't see it until just before the contact?" And the answer: "Yes, sir." "You didn't see the Chrysler before you came in contact with it?" And the answer: "Just before it hit me." "This is a straight away there?" And the answer: "Yes." And the question: "There is nothing to obstruct your view?" "No."

Then the question: "You say you saw the Chrysler?" Answer: "I saw it at the point of impact but not before. I didn't pay any attention to it." "You would pay attention to a car you knew was going to be in a collision with you. You mean you didn't see it in sufficient time to tell whether it was in your lane or its own lane?" Answer: "That is right, I couldn't tell you that."

[74] The Court: These are questions and answers by the Judge, who is presumably supposed to be unprejudiced and sitting as an impartial Judge. On the

theory of the DiMambro case, those are a thousand times worse. I will exclude it.

Mr. Mahony: And my rights are saved.

The Court: I assume in that case there was some police officer prosecuting?

Mr. Prendergast: That's right.

Mr. Mahony: And my rights are saved?

The Court: Surely.)

The Court: Now, Mr. Foreman and ladies and gentlemen of the Jury, I don't need to talk to you. I know you will not form a—please, I beg you, form no impression one way or the other. Try to do that. It is hard to do, but it is the sensible thing to do; we will be better off in the end. You would be having fewer prejudices. When I exclude something, you just forget about it.

We will recess now and, God willing, I will see you tomorrow morning at 10 o'clock.

(Adjournment.)

[75] SECOND DAY

Court Room No. 5, Federal Building,
Boston, Mass.,
Wednesday, November 30, 1955, 10 a.m.

[Conference at the bench.]

[The jury entered the court room at 10:30 a.m.]

Mr. Prendergast: Dr. Baskies. [To Court] May we tell the jury we are suspending with Mr. O'Brien?

The Court: Oh, yes. As I think you know, Members of the Jury, we always give the right of way to doctors and other professional men where the necessity requires it, but particularly doctors. Their schedules are usually very tight, and coming into court at times causes them great inconvenience, and we try to cooperate in order to avoid interference with their schedules.

DR. BARNET BASKIES, SWORN.

Direct Examination by Mr. Prendergast

Q. Your name is what, Doctor? A. Barnet Baskies.

Q. And you live where? A. 380 Salem Street, Medford.

Q. Your business is what, or profession? A. The general practice of medicine.

Q. You have been practising medicine how long? [76] A. Sixteen years.

Q. Your office is where? A. 380 Salem Street in Medford.

Q. And on June 21, 1952, did you have as a patient a Mr. Michael O'Brien? A. I did.

Q. Now, what time of the day did you see him? A. Well, I believe it was late in the afternoon. I saw him at home.

Q. At his home do you mean? A. At his home.

Q. That is, you went to his house where he was living? A. Yes.

Q. All right. Was that because of some call you had received? A. That is right.

Q. Had he been a patient of your previous to this time? A. No.

Q. When you got to the house, Doctor, will you tell us what the condition of Mr. O'Brien was? A. Well, he was lying in bed with a very severe pain in the chest, and he was cold, clammy, and very shortbreathed, and he complained of very severe pain in the left chest.

Q. Did you get a history from him at that time, or at some other time did you learn he had been invoived in an automobile [77] accident? A. Well, I asked him at that time, and he told me he had been in an automobile accident and he was taken to the Emerson hospital.

Q. So you knew he had been in an accident some time earlier? A. Yes.

Q. When you saw him what did you do for him? A. First

of all, I examined him. I examined him completely and found he had crepitus—

Q. Wait a minute. Will you explain to the jury what crepitus means? A. Crepitus is a sensation of grating which is felt or heard.

Q. And on that, if there is a break in a bone do you get crepitus, a sensation of rubbing or grating? A. Yes.

Q. You say you found that? A. Yes.

Q. All right. Now, then, what else did you do that night? A. Well, I sent him, I told him I was sending him back to the hospital for some X-rays to see just what the situation was, so I sent him to the hospital.

Q. So he went where? A. I sent him to the Saugus General Hospital in Saugus.

Q. Did you see him later that day in the hospital? A. Yes.

[78] Q. You may use any notes you may have there. Incidentally, we have hospital reports for two times he was in there, and if you find you need to use them you may use them. A. Thank you.

Q. Did you see him that same day? A. Yes, I did.

Q. June 21st? A. Yes.

Q. Now, when you saw him at the hospital what was his condition? A. Well, the chief complaint was the fact he was in an automobile accident 6 21 52. He had pains in left chest, re-occurring headaches. Pain in nose. Cannot breathe through nose. Pain in right arm and forearm and in elbow—in the elbow joint, that is. That is on the right side. He had pain in his left elbow joint, a cut bleeding, there was bleeding on the left hand which at that time was oozing serum. The hand was swollen. He had pain in left leg and abrasion below the knee, and the knee was swollen.

Mr. Mahony: Which knee was that?

Q. Which knee? A. That was the left. And he had an

abrasion—well, he had an abrasion in the right knee too, which was below the knee. He had a history of, unconsciousness of unknown duration.

Mr. Mahony: I object.

[79] Q. Never mind the history. Is that what you found when you examined him? A. That is found in the history. There was—he had pain in the left groin. He had a left inguinal hernia, direct pain going up into the abdomen.

Q. All right. What did you do for him—that night, now. A. That night I ordered empirin with codein, quarter grain every three hours. I ordered some sodium secconal for rest.

Q. What are those? A. Empirin compound is an analgesic with a narcotic.

Q. What is the other one? A. Sodium secconal is phenol barbital which relaxes him and presumably enables him to sleep.

Q. Go ahead. A. Icebag for the headache for the time being. This possibly was for the night.

Q. The next day did you see him? A. I did.

Q. What was his condition, and what did you do for him the next day? A. I ordered X-rays of the nose, chest, left elbow, left hand; flat plate of the abdomen. I ordered penicillin 300,000 units every six hours. I ordered a complete blood count and urinalysis. I ordered a cough medicine, syrup of Sedotol every [80] three hours for the cough. The patient at this time was in severe pain.

Q. Any narcotics that day? A. Oh, well, the narcotic order continued,—in other words, the order that was issued on the 21st.

Q. In order not to prolong the thing, was he getting narcotics for the first week? A. Oh, yes.

The Court: What is Syrup of Sedotol? Is it a narcotic?

The Witness: No, that is a cough medicine, sir. It con-

tains just about a quarter grain of codein to the ounce. I believe that is about the proportion.

The Court: You only get it by prescription?

The Witness: Only by prescription.

The Court: Because of the codein.

The Witness: Because of the codein.

[Discussion off the record.]

Q. For the first week he was getting all of these narcotics you have mentioned? A. Yes.

Q. He was getting a minimum of how much a day? A. Well, there would be, oh, an average of three or four doses a day, although toward the end of the week, after the first—well, the 24th we started with half a grain, we started [81] with a stronger dose of codein.

Q. On the 24th? A. On the 24th, three days after admission. We started with a quarter grain on the 21st, on the 24th he was getting half a grain every 2[illegible] hours.

Q. Would that have any effect on his mental capacity? A. Well, codein is a narcotic and naturally in the doses he was getting he would have some effect from it, dulling his senses.

Q. At the time he was getting it? A. Oh, yes, certainly.

Q. Let us go back. You say you ordered X-rays taken on the 21st. A. There were X-rays ordered June 22nd.

Q. When did the report come through on them? A. They were taken and the report came through June 24.

Q. Now, are you familiar with what the X-rays disclosed? A. I have that report here.

Q. Read it to us if it is in the hospital record. I don't think there will be any objection to your doing that. A. [Reading]:

"Patient's Name: Michael O'Brien.

Date of Examination: June 21, 1952

Referring Physician: Dr. Baskies

Parts Radiographed: Left hand, Left Elbow, Rib

Gage, KUB, Nasal Bones and Left Shoulder Girdle."

[82] Q. What do they disclose? A. [Reading]:

"There are comminuted fractures of the 5th, 6th, 7th and 8th left ribs posterior to the midaxillary line. The position alinement of the fractures of the 5th, 6th and 7th are good. There is slight overlapping of the fragments of the 8th, but the general position and alinement are good.

KUB discloses both kidneys to be obscured by markedly dilated small and large bowel. There are no evidences of urinary calculi. There are hypertrophic osteoarthritic changes of the 4th and 5th lumbar vertebrae.

There are no evidences of fracture of the nasal bones.

There are no evidences of fracture of dislocation of the left hand, left elbow or left shoulder girdle. There are marked hypertrophic osteoarthritic changes of the left wrist with almost complete bony fusion of the carpal bones."

Mr. Mahony: Which hand was that?

The Witness: The left.

A. [Continuing reading]:

—"marked spurring of the distal portion of the [83] radius and ulna and almost a complete obliteration of the radiocarpal joints with marked subchondral calcification.

There are marked hypertrophic osteoarthritic changes with bony spurring and lipping and narrowing of the left shoulder joint and the left acromioclavicular joint. There are also hypertrophic osteoarthritic changes of the left elbow joint."

Q. That is the first X-ray report, isn't it? A. That is the first X-ray.

Q. Was there another X-ray report? A. There is.
Q. What is the date of that, Doctor? A. July 9.
Q. All right. Read that one while you have it there.
Mr. Mahony: When was that taken?
Q. When was that taken? A. July 8, this one was taken.
Q. All right. When was the report? A. July 9.
Q. Go ahead and read it. A. [Reading]:

"Patient's Name: Michael O'Brien
Date of Examination: July 8, 1952.
[84] Referring physician: Dr. Baskies
Parts Radiographed: Chest, PA and Lateral Views.

There is still a considerable amount of fluid in the left base, but not near the amount as compared to the previous examination on July 5th, 1952. There is no displacement of the heart or mediastinum. That portion of the left lung that is visualized and the whole of the right lung, are well aerated and the fields are clear.

Impression: Pleurisy with effusion, left."

Q. Any other X-rays? A. There is one here on July 14, according to the record.
Q. When was it taken? A. July 11.
Q. All right, give us that report of the 14th. A. [Reading]:

"Patient's Name: Michael O'Brien
Date of Examination: July 11, 1952
Referring Physician: Dr. B. Baskies.
Parts Radiographed: Chest.

There is still a considerable amount of fluid in the left base, extending to the sixth rib anteriorally, but not nearly as much as on [85] the previous examination the heart and mediastinum."

Q. Does that complete it? A. Yes.
Q. Let me ask you something. Those X-ray reports are sign by whom? A. Dr. Reingold.

Q. He is a roentgenoligist? A. Roentgenoligist at the hospital, that's right.

Q. Now, up until the time you got the first report on the X-rays, give us the general picture of this man's physical condition, what you saw and the physical aches and pains you saw him going through? A. Well this man was basically a very dangerously ill man because of the fact that he had multiple fractures of the ribs on the left side, and he had an effusion of blood into the lung field.

Q. Explain what you mean by effusion of blood in the lung field.

Mr. Mahony: On the left side?

Q. On the left side. A. Left side. An effusion is an escape of blood from and through the tissues of the chest.

Q. All right. Go ahead. A. Into the lung itself. Well, Dr. Farrand—

Q. Dr. whom, now? [86] A. Farrand, F-a-r-r-a-n-d.

Q. Where was his office at that time, if you know? A. His office was in Boston, on Commonwealth Avenue at that time.

Q. Tell me this. Do you happen to know where Dr. Farrand is now? A. Well, I was told—

Q. No, no, not what you were told.

Mr. Mahony: Well, that's all right.

Q. Go ahead. A. I was told he was out in Fitchburg, somewhere in the western part of the state.

Q. He is not connected with your hospital any more? A. No.

Q. And in those days he had an office at 341 Commonwealth Avenue? A. I think it was 314 Commonwealth Avenue.

Q. You knew what he specialized in? A. Oh, yes.

Q. What was it? A. Chest surgery.

Q. All right. Now go ahead. Was he called into this

case? A. He was called in to examine the patient for the fluid in the chest, and according to the record—

Mr. Mahony: Is this the hospital record you are [87] reading?

The Witness: Yes.

Q. Tell the Judge and Mr. Mahony the date he was called in? A. June 24.

Q. 1952? A. 1952.

Q. He was called in. And from that record will you tell us what he did? A. Well, he did an interstitial nerve block.

Q. What is that? A. He injected—well, if you will let me finish—with 1 per cent procaine.

Q. Go ahead. A. In other words, he injected novocain solution, which is the same as procaine, along the rib course into the area, so there wouldn't be any pain, and he did this to reduce the pain of the fractured ribs. That was on June 24, and I was there at that time, and I referred to the rib area as such.

Q. All right. Go ahead. You were telling us about his condition.

Mr. Mahony: Did Dr. Farrand treat him on that day?

The Witness: No, he was called in again.

Q. No, but he is talking about that day? A. That day.

Q. Let us clear up Dr. Farrand's connection while we are at [88] it. When was he called in again? A. There should be two consultation sheets, or a consultation sheet here, which I don't seem to be able to find. I might interject here—

Mr. Mahony: Wait a minute.

Q. Wait, don't interject anything.

The Court: He said there were two consultations or reports.

Q. When was the next time Dr. Farrand was brought

into the thing? A. The 24th of June was the first time. Then July 3, 1952.

Q. What did he do on that date? A. He did a thorocenteses and removed 646 c.c. of bloody fluid.

The Court: What is a thorocenteses?

Mr. Prendergast: That's the Sixty Four Dollar question. I can't even pronounce it.

The Witness: Actually, it is a tapping of the chest; in other words, you tap the chest with a needle to take out fluid or air. In this case he took out bloody fluid.

Q. How much is that? A. 640 c.c.? Well, about 500 c.c. would be about a pint; so, in other words, 640 c.c.—

Q. A fifth! A. In other words, there were 660 c.c. of bloody fluid [89] removed and 1,000,000 units of penicillin instilled; so he basically took out, well, with 500 c.c. being a pint, it's about, well, about a pint to a quarter to a third.

Q. Did you see him any more, or are those the end of it? A. July 7.

Q. Go ahead. A. He checked on him at that time.

Mr. Mahony: He—what?

The Witness: Checked on him at this time, July 7, and he says:

> "X-rays show considerable amount of pleural effusion. Thorocenteses was performed again and 600 c.c. bloody fluid obtained."

Q. You mean by that he twice went in and twice took out 600 c.c.? A. This time he obtained 600 c.c.

Q. All right. A. It might be 650, from the figure here.

Q. [Examining] It is "600." A. Yes. And he makes the notation "Will tap again on Wednesday."

Q. Did he tap again on Wednesday? A. [Reading]:

> "Will tap again on Wednesday. We can check after that with repeat X-ray. I believe we are [90] making considerable progress in this hemothorax."

Q. All right. Tell me, I want to go back for a minute.

The first time he saw this, this particular doctor saw the patient was the 24th of June, was it? A. June 24, yes.

Q. And at that time you say he performed a nerve block? A. That's right.

Q. And in performing the nerve block he used some novocain; that's right? A. Novocain.

Q. Does that have any effect in addition to what you have already said of dulling this man's senses; in other words, if you add that novocain to what you had already prescribed for him would that make him duller or not? A. I imagine it would. After all, this man was in severe pain and the pain was so severe that not even on codein to a man of his age giving half a grain of codein is a tremendous dose. Not even the codein enabled us to give the man relief from pain, therefore we had to inject procaine.

Q. At that time — Let's go back now. You have already described in substance his condition for the first week; have you? A. That is right.

Q. Is there another report from Dr. Farrand? [91] A. Yes, there is.

Q. Let's get it in. A. On July 11 there is. I just can't make out this word. "There is"—

The Court: I can't help you. Maybe Mr. Mahony can.

The Witness: Some of the writing here is kind of difficult.

Mr. Mahony: Mr. Prendergast is the one to read it. Let him do it.

The Court: It isn't in your handwriting.

The Witness: No, it isn't. It is in Dr. Farrand's.

Mr. Prendergast: "B-l-o-u-n-t-i-n-g."

Mr. Mahony: May I have a look at it?

Mr. Prendergast: Oh, sure [handing]—but you won't tell us the truth.

Mr. Mahony: Well, I do object to that.

The Court: All right, counsel doesn't mean anything by that.

Mr. Prendergast: No, no, no.

Mr. Mahony: [Reading]: "There is blounting of costophrenic"—

The Witness: That's right. That means—sound reasonable. "There is blounting of costophrenic angle"—

[92] The Court: What is what?

The Witness: —"of costophrenic angle." That is the angle between, at the edge of the ribs. It's at the side, it's at the edge of the rib, and we call it the costophrenic angle.

Mr. Prendergast: The Judge wants to know what "blounting" is.

The Court: I don't know what that means. Probably the jury doesn't. Go ahead. What do you say it is?

The Witness: Blounting is a quieting down, a lessening.

Q. All right. A. [Reading]:

"There is blounting of costophrenic angle with slight amount of fluid and or thickened pleura at left base. I believe patient is doing well and does not need a repeat thoracenteses at this time."

Q. That is the end of his work on Mr. O'Brien, apparently? A. Yes.

Q. All right. Now let's go back. You described the man's condition, I think, for the first week he was in the hospital. Will you give the jury a description of your treatment of him for the second week he was in the hospital, and what his condition was, and whether he was suffering pains and aches? [93] A. Well, from the 21st to the 27th—

Q. Also if he was under any anesthetics? A. Well, the narcotic order was still standing; in other words, he was receiving narcotics because he was having pain.

Q. Go ahead. A. Well, with regard to narcotics, on July 3d I decreased the codein, instead of every 4 hours I made sure he was getting it every three hours again.

Q. What did he receive that for? A. Well, he was still having a lot of pain.

Q. Go ahead. By the way, what did you do with his ribs? Strap them up or what? A. No, no. By that I mean basically I left his ribs to Dr. Farrand in this respect: that I felt as long as I had called in Dr. Farrand, to consult him about the ribs, I figured that I should follow his advice, and his advice on the first, when he saw him first on June 24, was "Continue on antibiotics;" then when he did the nerve block, "Avoid tight binders;" then of course he says, repeat X-rays, and he figured if the patient was unable to raise secretions he would do a bronchoscopy examination.

Q. Tell us what you did on the second week and what his condition was? A. Well, on 7 4 patient was very uncomfortable, respirations were about 30 a minute, pain in the chest in the left apex, and [94] he had pain from the hernia. My next record here—

Q. We haven't heard anything yet about his nose other than you said there was no fracture. What was the condition of his nose on the first occasion you saw him. Describe it to the jury, if you will. A. The nose was swollen.

Q. Was it bleeding or cut or what? A. Presumably he had—it was a little scraped, and he had some clots in the nose.

Q. How long did that bother him? A. Well that bothered him quite a while, but of course not as much as his chest and the left inguinal hernia.

Q. Did the chest bother him as regards breathing? A. Oh, yes.

Q. All right, go ahead. A. On July 6, there is still some pain left in the chest, especially at the base.

Mr. Mahony: The left side of the chest?

The Witness: Yes.

A. [Continued] From July 7, there is slight improve-

ment, and he continued that way. I have a notation here on July 14, "Pain still in the chest", and he complained quite a bit of pain in the left hand.

Q. How was he sleeping at this time? A. Well, I think for that we should go to the—

[95] Q. Nurses' notes? A. —nurses' notes on that.

Q. Well, we will let somebody else read those. We don't want to waste too much of your time. Well, all right. Give us a general picture now from that date up to the date he left the hospital? A. Well, his condition improved in regard to the chest, and, even though the hernia bothered him, where he had so much injuries to his chest I felt the best answer, and so did the consultant feel the best answer to this thing was to let him wait until we had the chest well before we did anything else with the hernia.

Q. Was he suffering all during this time? A. Oh, yes.

Q. Now, then, at some time he was discharged from the hospital? A. Yes.

Q. What date was that? A. 7 26.

Q. I think you have given us the general picture as to what the diagnosis for this man's condition was, haven't you? A. Yes.

Q. As to his injuries. All right. You saw him between that time and the second time he went into the hospital, did you? A. I did.

[96] When was that? A. I saw him July 28th.

Q. Where did you see him? A. I saw him in the office.

Q. All right. You saw him in the office on the 28th. What was the—give us the dates from that time up to the time before he went into the hospital the second time. A. You want the whole of it?

Q. Give us the dates. A. July 28, 30; August 4, 7, 9, 11, 14, 16, 18, 21, 23, 25, 28, 30; September 2, 4, 6, 8, 11, 13, 15, 18, 20, 22, 24, 27, 29; October 2, 4, 6, 9, 11, 14, 16, 18, 20, 23, 25, 27, 30; November 1st, 4, 7, 10, 13, 15, 17,

20, 22, 24, 28; December 2, 5, 8, 12, 15, 19, 22, 27; and January 3, 1953.

Q. Then he went into the hospital the second time on January 4? A. That is right.

Q. All right. Now, give us the general picture as to the condition of this man between the two hospital visits. A. Well, he complained of pain. He complained—well, the most important things I got noted here, he complained of pain in the left chest, and he complained of pain in the left inguinal area.

Q. Go ahead. A. And he was coughing quite a great deal during the whole [97] process of the time, and of course this would cause pain in the left inguinal area. His blood pressure remained fairly stable, his pulse remained fairly stable, and basically he was improving in the chest.

Q. By the way, let me ask you this. Did he lose any weight? A. I believe he did, although I didn't make a record of the fact.

Mr. Mahony: No record of his losing weight?

The Witness: He did lose weight but I don't believe I have it recorded.

[A pause.]

Q. You say you know he lost weight but you don't know how much? A. Yes.

Q. Did you finish what his condition was as to the time between the two visits to the hospital? A. Yes.

Q. As to his general condition? A. Yes.

Q. What about his chest? What was his condition relative to breathing? A. Well, he had pain, he still had pain on deep respiration in the chest, in the left chest.

Q. Has that pain so far as you know ever cleared up—as far as you know?

[98] Mr. Mahony: Wait a minute. I object.

Mr. Prendergast: As far as he knows?

Mr. Mahony: I still press the objection.

Mr. Prendergast: I withdraw it.

Q. As of the first time you saw him and treated him was that pain still present, as far as you know?

Mr. Mahony: Would you fix that date?

Mr. Prendergast: I will in a minute.

A. The last time I saw him, if I may read the record, he had a swelling in the legs, swelling in both scars downwards, and the area very tender; short breath on walking; tires very easily; walks a hundred yards and has to sit down.

Q. Do you have anything about pain in the chest? A. Well, he had a pain in the chest.

Q. Where was the scar you just spoke about? A. That scar was on the side, right side.

Q. What was that from? A. That was from surgery that was done on him.

Q. Oh, at the Mass. Memorial? A. At the Mass. Memorial.

Q. In the meantime before you discharged him had he been operated on for his hernia? A. Yes.

Q. How many times was he operated on for his hernia? A. Twice.

[99] Q. Give us the dates of those operations. A. He was operated on 1 12 53, and 2 4 53.

Q. By whom? A. By Dr. Cotta.

Q. All right. Now, then, when did Dr. Cotta come into the case? A. Dr. Cotta came in—Dr. Cotta was just called in as a surgical consultant July 9, 1952.

Q. And how long did he stay in the case? A. Well, he stayed in the case in this respect: that he examined the patient and wrote up a consultation sheet with his diagnosis and decided when the man's chest heals up sufficiently he would operate.

Q. Then he did operate? A. He did.

Q. On the two occasions? A. That is right.

Q. Now, then, he went back into the hospital on January 4, I think you said. Will you tell us why he went back to the hospital then? A. He went back for the surgery on the inguinal hernia.

Q. How long was he at the hospital at that time? I think it's up to March something. A. March 6.

Q. All right. Was the only reason for being in the hospital [100] between January 4 and March 1st the inguinal hernia? A. Well, he had two operations on the hernia, and I believe at the end of this time he had an episode in which he had pain in the chest, on February 25, 1953.

Mr. Mahony: Is this part of the hospital record?

The Witness: This is part of the hospital record I am reading. And on February 25, 1953, the X-ray report at that time describes the midlung field, right, which "could well represent a bronchogenic carcinoma, although of course a localized inflammatory lesion cannot be ruled out. A bronchoscopy, as well as cytologic studies, is recommended." In other words,—

Q. When you speak of carcinoma are you just reading the X-ray report, or are you just giving us your opinion? A. My own opinion in this respect.—

Mr. Mahony: No, wait a minute.

Q. No, I will ask this question. The X-ray reports indicate, do they not, that the fields were clear; the X-ray reports taken during the first visit to the hospital indicate, do they not, the fields were clear, whereas now on the second visit to the hospital, when the X-rays were taken they revealed a density which could well represent a carcinoma; is that right?

The Court: Do you object?

Mr. Mahony: Yes.

[101] The Court: I will admit it.

Mr. Mahony: Your Honor has ruled on it?

The Court: Yes, I will admit it. I will let you cross examine him later.

Q. Go ahead, sir. A. On January 7, 1953—that's the second admission—he had then X-rays of the chest, KUB, and upper gastro-intestinal series; and the impression at that time was:

"(1) There is a moderate pulmonary fibrosis in the left base.

(2) There are no evidences of an organic lesion in the upper gastro-intestinal tract."

Q. Doctor, I thought you said something had appeared there. What was it? A. Well, in the record he started with—on 1 11 53, he complained of a pain in the right chest, and, feeling that was pleurisy, I ordered an X-ray.

Q. Go ahead. What did the X-ray disclose? A. The X-ray disclosed—

Mr. Mahony: When was it taken?

Mr. Prendergast: February.

Q. What date in February, did you say? A. I ordered X ray of the chest February 13.

Mr. Mahony: Was it taken on the 13th?

The Witness: It was taken on the 13th, and the [102] report on the 14th.

Q. Give us the report. A. [Reading]:

"Patient's Name: Michael O'Brien

Date of Examination: February 13, 1953.

Referring Physician: Dr. Baskies

Parts Radiographed: Portable Chest.

The lower two-thirds of the right lung is occupied by a homogeneous soft density extending to the right hilum. This has the appearance of a rather wide-spread atelectasis, with perhaps secondary pneumonitis. The upper right lung and the whole of the left lung are well aerated and clear. The diaphragms

are sharply outlined and the costophrenic angles are clear."

The Court: Surely we can translate that for the jury. I don't mean—

Mr. Mahony: You mean the medical terms?

The Court: Yes.

Q. Tell us what they mean.

The Court: What is the meaning of those medical terms? Go ahead. Please don't misunderstand me. You know what they are.

Mr. Mahony: I understand this is the evidence in positive terms as we discussed at the bench.

[103] Mr. Prendergast: Part of the evidence we were talking about.

Q. Give us the laymen's words for those that you just read. A. Well, the chest X-ray showed the lower two-thirds of the right lung was occupied by a soft mass; in other words, the shadow there, that did not belong there, presumably, according to the X-ray roentgenolist was a soft mass, and he felt it was—

Mr. Mahony: No.

Q. No, never mind what he felt. A. Well, the appearance, has the appearance; in other words, the base of the X ray—

Mr. Mahony: I thought he was going to interpret the terms.

The Court: That is right.

Mr. Mahony: Which he hasn't.

The Court: It may be his interpretation of what is meant by "soft mass".

Q. A soft mass that shouldn't be there? A. Shouldn't be there.

Q. All right, we can't go any further. Now, tell me something—

The Court: What else? Anything else?

A. "This has the appearance of a rather widespread atelectasis."

Q. Tell us what that means. A. Well, atelectasis is collapse of the lung, so that it lies [104] in an area of air.

Q. Anything else? A. "—with perhaps secondary pneumonitis." Pneumonitis is inflammation of the lung. "Itis" means inflammation.

Q. Anything else? A. No, that is all.

Q. Previous to this time had an X-ray been taken with the right lung? A. Yes.

Q. When was that? I mean, during the first visit to the hospital was he first taken with the right lung? A. Yes.

Q. All right. Now go back and tell us, read it to us and then tell us whether or not the soft mass that you are speaking about as being present in the X-ray taken on the second visit to the hospital was present in the X-ray that was taken on the first visit to the hospital? A. Well first of all, on June 24, 1952,—

Q. The X-ray was taken of the right lung? A. The X ray was of the chest, at which time we found fractured ribs.

Q. Did you find anything in the right lung? A. Nothing in the right lung.

Q. So that evidences of the right lung was all right? A. Yes. There is another X-ray July 9.

[105] Q. Go ahead and read it. A. X-ray of the chest, P-A and lateral views.

Q. Was there anything in the right? A. That portion of the left lung that is visualized—

Mr. Mahony: No, on the right.

Q. Of the right. A. Of the right lung? The areas are well aerated and fields are clear.

Q. What does that mean, in other words? A. In other words, they are well.

Q. There was nothing wrong with the lung at that time? A. That is right.

Q. But in February there is a soft mass that is disclosed in this X-ray? A. That is right.

Q. In the right lung? A. Yes.

Q. All right.

Mr. Prendergast: I am going to ask if we may have a recess for ten or fifteen minutes so that I may suspend with the witness and then put on another doctor for about ten or fifteen minutes. He won't go over ten or fifteen minutes.

The Court: All right. I try to be very generous with doctors. I will suspend for twenty minutes.

[Recess from 11:35 a.m. to 11:55 a.m.]

[106] DR. GERMAIN J. COTTA, Sworn.

Direct Examination by Mr. Prendergast

Q. Doctor, you have in front of you both hospital records? A. Yes.

Q. Your name is what? A. Germain J. Cotta.

Q. Your profession is what? A. Surgeon.

Q. Where is your office? A. 626 Highland Avenue, Malden.

Q. And you have been practising how long? A. I graduated from Tufts Medical in 1927, and I have been in private practice since 1928.

Q. At some time in 1952 did you have as a patient a Michael O'Brien? A. Yes, I did.

Q. And you have the records of Michael O'Brien in front of you? A. Yes.

Q. Now, at some time did you treat that gentleman for—perhaps you can tell us better what you did. A. On the 12th of January I operated on this man for a left inguinal hernia.

The Court: What year?

The Witness: 1953, your Honor.

[107] Q. Now my brother asks, and I think it is right, will you kindly tell us if you can when you first saw Michael O'Brien. A. I saw him on July 9, 1952.

Q. Where was that? A. That was at the Saugus General Hospital.

Q. And at that time did he have a hernia? A. Yes, he did.

Q. Now, then, did you at that time get a history of him having been in an automobile accident? A. Yes.

Q. And did that history reveal the fact that he had been in this accident on June 21, 1952? A. Yes.

Q. Did he tell you what had happened to him, as to how he had this accident and how the accident occurred? A. He gave me a history of being in an accident, automobile accident.

Q. Now, what is this kind of hernia which you just mentioned? A. He had a traumatic left inguinal hernia, which means a hernia following injury.

Q. Trauma means what? A. Means injury.

Q. All right. Now, explain to the jury what a hernia is, what a traumatic hernia is. A. A hernia is a protusion of the abdominal viscus into the [108] peritonical sac.

Q. Now, those are medical terms. Give us the layman's language. A. If there is weakness in the abdominal wall and pressure increases in the abdomen itself, it will squeeze one of the organs, whether it be the intestine, or the omentum or bladder or any other organ, into that weakened area and create a sac, naturally.

Q. Do I understand you operated on this man for hernia? A. Yes.

Q. Twice? A. That is correct.

Q. Please tell the Court and jury what you did by way of each operation. A. On the 12th of January, 1953, I repaired the left inguinal hernia. Do you want the details?

Q. Yes, give us the details as to what you did by way of repair. A. I could describe the surgery.

Q. All right, go ahead. A. I made a "4-inch incision over the left inguinal ligament beginning at pelvic tubercle —aponeurosis of external oblique incised exposing inguinal canal. Hernial sac medial to cord was exposed and freed by blunt dissection. A purse string placed at neck, tied and sac removed. Falx aponeurotica inguinalis sutured inguinal ligament with interrupted chromic [109] =2 sutures medial to the cord and one suture lateral to cord. aponeurasis of external oblique sutured lateral to cord with continuous suture of catgut =1. Skin closed with clips."

Q. Let us—now tell us what you did in ordinary language. Did you cut him here and cut him there?

Mr. Mahony: Wait a minute. Let him tell us.

Q. All right, you tell us. A. I made an incision—

Q. "Incision" means a cut, does it? A. Yes.

Q. That's what I'm trying to get. A. I made a cut.

Q. Where? A. In the left groin, and as I went through the layers of tissues I would expose the hernial sac, and then I remove the hernial sac and then reapproximate the edges of the wound in their proper layers and reinforce the weakness in that abdominal wall.

Q. And after you had done that you would sew them together? A. Then close the skin with clips.

Q. At some time later did you perform a second operation? A. Yes.

Q. When was that? A. On the 4th of February, 1953. It was the left femoral hernia that was repaired.

Q. Now, Doctor, you did the same type of operation? [110] A. Yes; on the femoral canal.

The Court: What is that?

Q. What kind of hernia was that? A. Well, the femoral canal runs down the inside of the leg, and the inguinal

canal runs in the inguinal sac, which is a canal that runs parallel to the inguinal ligament; in other words, one is running down the leg and the other is running across the leg.

Q. Now, have you an opinion as to whether or not that hernia was traumatic in origin? A. Yes, I have.

Q. What is that opinion? A. It was a traumatic left femoral hernia, as well as a traumatic left inguinal hernia.

Q. Assume this man had been in an automobile accident January 21st, 1952; that previous to that date he had no hernias; that thereafter in the hospital it was discovered that these hernias existed; that when the accident occurred the man was thrown to the right, the wheel of the car was knocked out of his hand in some way and as he fell down he fell over the wheel so it came in contact with his abdomen; have you an opinion as to whether or not that accident was an adequate cause for the herniai condition that you found? A. Yes, I have.

Q. State your opinion. [111] A. That is was caused by the accident.

Mr. Prendergast: Thank you. Excuse me for one minute.

The Court: Tell the jury what you did on the second operation. If you care to look at the record it is all right.

A. [Reading]:

> "The old 4-inch incision was reopened over the left inguinal canal—fossa ovalis and femoral triangle were exposed and a sac was freed by sharp and blunt dissection running up through femoral canal up to abdomen. Neck closed with purse string suture—sac was removed. Stump was transposed—aponeurosis of external oblique and inguinal ligament sutured with #2 catgut to pectineus muscle"—

The Court: What is "aponeurosis"?

The Witness: "Aponeurosis" is extension of a sheet-like tendon or muscle.

A. [Continued] "—obliterating femoral canal. Skin closed with clips."

Q. What was your bill for services, Doctor? A. I don't remember. I don't recall the bill I submitted.

Mr. Prendergast: [To counsel] Have you got the bill?

[Discussion off the record.]

[112] Mr. Prendergast: That is all.

Cross-Examination by Mr. Mahony

X-Q. Doctor, you were called in to examine this patient by whom? A. By Dr. Baskies.

X-Q. And the first time you saw him, the plaintiff, was July 9, was it? A. That is correct.

X-Q. Where did you see him? A. At the Saugus General Hospital.

X-Q. You made an examination of him at that time? A. Yes, I did.

X-Q. Would you tell us the nature of the examination that you made? A. I got a history from the patient.

X-Q. Have you got the history, the nature of the examination that you made? A. I examined his chest, my report says.

X-Q. You examined his chest? A. I looked at the patient and got the—

X-Q. First, you examined him? A. I examined him, yes.

X-Q. Just tell us how you examined him, first? A. I looked at the general condition of the patient, to begin with.

X-Q. What do you mean by that? [113] A. Well, if he is walking around, if he is lying in bed, if he is conscious, if he is rational, if he is in a coma; if he is lying flat in bed or sitting up and conscious.

X-Q. At the time he was thoroughly conscious? A. Yes, he was.

X-Q. Answered all your question? A. Yes.

X-Q. Didn't show any mental retardation or dullness at all? A. I have no note about it.

X-Q. Would you have noted it if you found it? A. Most likely I would.

Mr. Prendergast: Found what?

The Court: Any mental retardation.

Mr. Mahony: And dullness.

X-Q. Now, what is the next thing you did on examination? A. Well, I found he was having respiratory difficulty—

X-Q. No, just what examination you made, please. A. At the time I went over his chest.

X-Q. Yes. What did you find? A. And he had multiple contusions and fractures of the ribs.

X-Q. Yes. Anything else you did by way of examination? A. On the chest.

X-Q. Yes. A. Then I proceeded to examine his abdomen and found a mass in the left inguinal region the size of a small orange which [114] is reducible but no attempt was made to make the patient cough because of pain in the chest.

X-Q. When you say it was reducible what does that mean? A. That by pressure you could make that mass disappear.

X-Q. That is, by pressure of your fingers? A. Of your fingers.

X-Q. All right. What next did you do in examination? A. Well, I think that's all I did at the time as far as examination was concerned.

X-Q. But you made it as complete as you could in your field of surgery? A. That is correct.

X-Q. And you told us all that you discovered at that time in your field? A. Yes.

X-Q. Therefore,——

Mr. Mahony: Strike out "therefore".

X Q. You found no femoral hernia at that time, did you, Doctor? A. I didn't know one was there. That's right.

X Q. You did not find one, did you? A. That's right.

X Q. If you found a femoral hernia at that time you would have made a note of it, wouldn't you? A. That's correct.

X Q. What is the next time that you saw him? [115] A. But Dr. Baskies knows where it could be found.

X Q. No, I am asking you the next time you saw him. A. If I could locate his record I would know if I saw it or not.

X Q. Have you got the hospital record there? A. Yes.

X Q. Do you have any note of your own? A. No, I don't. It would have been just before I got there.

X Q. You mean on the second? A. Yes. It would be the next examination.

X Q. Let's see. The first examination was on July 9, 1952? A. July 9, 1952.

X Q. The first operation was January 12, 1953, was it not? A. Well, it's the second operation I would have seen him again.

X Q. You wouldn't have seen him between July 9 and January 12, 1953? A. No, I don't believe I would.

X Q. In other words, from July 9, 1952, up to January 12, 1953, about six months, you did not see him? A. That's correct.

X Q. And on January 12 you say that you repaired this left inguinal hernia; correct? A. That is correct.

X Q. Is there a distinction between a direct— [116] A. January 12, 1953—did you say '53?

X Q. '53. Six months later? A. That is right.

X Q. Is there a difference between the direct and indirect inguinal hernia? A. Yes, there is.

X Q. What is the difference, Doctor? A. The direct inguinal hernia is a protrusion medially to the cord, and

in the indirect hernia it follows the cord in a lateral manner.

X-Q. Isn't it also manifested on the external parts of the body? A. Very much so—if I understand your question.

X-Q. I say, does the direct hernia indicate itself on the part affected? A. No, not necessarily.

X-Q. What is an indirect hernia? A. The indirect hernia is the course the hernial tract follows, and it follows the length of the cord, or the length of the inguinal canal.

X-Q. What type was this? A. This is, I believe, a direct inguinal hernia.

X-Q. And how long did the operation take? A. It is written down here somewhere on the anesthesia sheet, probably. Are you referring to the first operation?

[117] X-Q. Yes, the inguinal hernia operation. A. Operation began at 11:30 and closed at 11:56.

X-Q. 26 minutes later? A. That is correct.

X-Q. How large an incision was made in the groin? A. 4-inch.

X-Q. 4-inch incision, 26 minutes operation. And what length of time after that would you say he had recovered from the surgery? A. Well, Dr. Baskies had charge of the patient, but I would say, a man of his age for an operation, a direct inguinal hernia operation would require, oh, six months.

X-Q. Now, on that date, Doctor, July 9, 1952, there is no note that you made and no note in the hospital record of any hernia, is there? A. No, there is not.

X-Q. The next time you saw him was February, 1953? A. Yes.

X-Q. Did you see him between January 12, 1953, when you operated the first time, and February 4, 1953, when you operated the second time? A. Yes.

X-Q. When did you see him? A. We like to see them as soon as we can before an operation.

X-Q. Would you say it was a day or two before the operation? A. That may be right.

[118] X-Q. You may look at those dates in the hospital record. A. I will try to.

X-Q. February 4 was the operation. In any event, Doctor, you think it was a day or two before February 4, 1952? A. That is correct.

X-Q. That is when you made the first comment of any femoral hernia? A. That is correct.

X-Q. With reference to that second operation, that took how long? A. It began at 10:49 a.m. and was over at 11:30.

X-Q. Three-quarters of an hour? A. That is correct.

X-Q. And the incision was how large at that time? A. 4-inch.

X-Q. Where was that made? A. The old scar was re-opened.

X-Q. So that was again up in the left groin? A. Left groin, that is correct.

X-Q. And the incision was made through the old scar? A. And extended down into the thigh.

X-Q. And within that same period of six months I assume, therefore, he would be over the results of the femoral hernia, or less or what? A. That is because of an uncomplicated post-operative time.

[119] X-Q. Were you called in again at any time after that? A. I believe I was.

X-Q. And when? A. It was following the X-ray, I believe. I wasn't called in to examine, I was told.

X-Q. You did nothing at that time medically? A. No, I did not.

X-Q. Now, Doctor, were you told the history of the case at any time that this truck that Mr. O'Brien was driving was in contact with one automobile and then almost imme-

diately after in contact with the second automobile? A. No, I don't get those details of the accident when I get the history.

X-Q. Well, if there were two separate contacts with two separate automobiles, then on your theory of trauma with violence it might have been the second contact or contact with the second automobile that that happened?

Mr. Prendergast: Objection.

The Court: Will counsel come up.

[Conference at the bench, during which the following is recorded:

Mr. Prendergast: My objection is simple. The question is not the probability, the possibility.

Mr. Mahony: The burden is on you to show the probability.

[120] Mr. Prendergast: Not in this case.

The Court: Isn't the burden upon him to show there is a causal connection?

Mr. Mahony: Certainly.

The Court: Between the force of the contact and the physical damage?

Mr. Prendergast: If the negligence of this plaintiff was such that it threw the car into the path of the defendant—

The Court: He doesn't deny that. There being a situation created by your own client, whatever it was, a fortiori wouldn't it carry into any situation which might result?

Mr. Mahony: The jury might find no. I have known of two automobiles hitting a man. The first one leaves him on the highway and there he comes in the path of an automobile which goes over him altogether; two separate accidents.

The Court: What is the question?

[Last question read.]

The Court: I think I will exclude it.

Mr. Mahony: I would like to make an offer of proof on that. I expect the witness to say that when the violence occurred from the second contact or the contact with the second automobile, that [121] violence was sufficient to cause the hernia if it occurred between the time of the contact between O'Brien's truck and the Whitney automobile, and the contact between O'Brien's truck and the Hobart automobile.

The Court: I think I will exclude it. That does not mean now that I will restrict you in your argument. I think that I will have to do it; but I don't want you to feel I exclude you from arguing that to the jury. You show those conditions.

Mr. Mahony: It is a hypothetical question I put to the doctor. Assume, Doctor, that at the time of the first collision this man continued in his seat and the truck went on and the truck and the second automobile came in contact, knocking him to the floor of the cab, would that be an adequate cause.

Mr. Daly: There is no such evidence.

Mr. Mahony: It can find it.

Mr. Prendergast: It can't.

Mr. Daly: Oh, no, the evidence says he was thrown.

Mr. Prendergast: If you put the hypothetical question you have got to produce the facts to back it up.

[122] Mr. Mahony: Here is the situation. This doctor is put on for his convenience before the testimony of the plaintiff is finished. Now, am I bound by the evidence tending to show the accident took place in one manner when other evidence may prove otherwise?

Mr. Prendergast: If in cross-examination of my man later he says what you say is the fact, I will withdraw any objection.

The Court: I will order him back.

Mr. Mahony: And I might add there are other witnesses to follow whose testimony might show a different causation.

The Court: I think in the present situation I will have to exclude it. If you find it necessary, the doctor will have to come back again.

Mr. Prendergast: He will be available.

Mr. Mahony: I will put this other question so your Honor may rule on it, and of course I am saving my rights.

The Court: That is right.]

X-Q. Before you answer this hold up until we get the situation straightened out. If you were to assume, Doctor, that Mr. O'Brien was not thrown down to the gears on the contact between the truck he was driving and the Hobart car, the first car [123] with which the truck was in contact, but that he continued on with his truck and then came in contact with the second car, the Whitney car, after which the truck turned toward and ended up against the fence, near the fence, and then the plaintiff was found on the floor of his cab, would that second contact be an adequate cause for the hernias which you found?

Mr. Prendergast: Objection.

The Court: Are you to have evidence, your Honor, from which the jury could find those facts?

Mr. Mahony: I am certainly going to offer evidence he continued and struck the second car.

Mr. Prendergast: That doesn't answer the question.

The Court: He wasn't thrown from his position by the truck—

Mr. Mahony: Substantially, yes.

Mr. Prendergast: No, I object to that. Circumstantially—I don't know what he means by that.

Mr. Mahony: Evidence from which the jury may well

infer he continued driving the car and that he fell after the second contact.

The Court: The difficulty with circumstantial evidence is, we would agree, it may exclude every reasonable hypothesis.

Mr. Mahony: May I note my exception.

The Court: The jury may disregard entirely my last [124] statement. Don't misunderstand me. There is no attempt to do anything here except that which is consistent with the duty of each attorney. When they come here as attorneys representing their clients it is their duty to make certain from the legal point of view that that which is admitted is admitted under circumstances which makes it available for you, for the jury to find one way or the other. Counsel have a right fundamentally to object to my rulings, and if they did not they would not be performing their duty. It is perfectly proper for them to object at any time, and it is my duty to rule on the questions, whatever they are, when they arise.".

[Further conference at the bench, during which the following is recorded:

The Court: Now, what is your objection?

Mr. Prendergast: He is asking him to assume the man was not thrown. There was no such evidence.

The Court: He says there may be.

Mr. Prendergast: No, he doesn't.

Mr. Mahony: I will have evidence from which the jury may infer, that the reasonable inference from the facts would be so and so. We will have evidence he fell after contact with the second car.

Mr. Prendergast: And was sitting on the seat?

Mr. Mahony: That he was seen sitting on the seat.

Mr. Prendergast: That is, after the first [125] contact?

Mr. Mahony: I am informed there will be evidence that he was on the seat even after the second collision.

Mr. Daly: That isn't your hypothetical question.

Mr. Mahony: That the violence that occurred on the second contact would be equally adequate.

Mr. Prendergast: If Mr. Mahony wants to state to the Court he is going to produce evidence that even after the second accident my man was sitting on the seat, I am perfectly willing for him to argue that fact and then ask the doctor.

The Court: Is that all right?

Mr. Mahony: I will rest on the question now. If the Judge says O.K., then O.K.; if he says he will strike it out, I'm going to follow it up.]

The Court: [To jury] Regardless of how I am going to rule here, I want you to understand the nature of a hypothetical question. When a hypothetical question is asked, you are asked to assume certain facts, or the expert, in this case the doctor, is asked to assume certain facts. Primarily in the hypothetical question the expert is asked to assume certain facts. It is for the jury to say whether or not the evidence produced before you, as far as you have heard [126] it, would warrant you in believing that the facts are so; then you have the right to consider them as facts and to reach your own conclusion upon them. Now, here this doctor is being asked for his medical opinion upon the facts which are incorporated in the question in connection with this particular line of questioning. Isn't that right, Mr. Mahony?

Mr. Mahony: On cross-examination.

The Court: Predicated upon certain assumed circumstances.

[To reporter] Will you read that question to me again?

[The following question is read:

"If you were to assume, Doctor, that Mr. O'Brien

was not thrown down to the gears on the contact between the truck he was driving and the Hobart car, the first car with which the truck was in contact, but that he continued on with his truck and then came in contact with the second car, the Whitney car, after which the truck turned toward and ended up against the fence, near the fence, that then the plaintiff was found on the floor of his cab, would that second contact be an adequate cause for the hernias which you found?"]

I will permit that question.

Mr. Prendergast: I want to call your attention to [127] one thing. That question simply indicates what our proof has been. That question simply says the man was found in his truck. Well, he was always in the truck.

The Court: No, but Mr. Mahony has said he is asking this question predicated upon your promise you are going to offer evidence which would indicate that he was not knocked down or was thrown from his seat—

Mr. Mahony: Not thrown from the seat. Sitting on the seat.

Mr. Prendergast: It doesn't ask that.

Mr. Daly: That question doesn't ask that.

The Court: Do you want to reframe it? Will counsel come up for a minute.

[Further conference at the bench.]

Mr. Mahony: Let me withdraw that question and put it this way.

X Q. In the hypothetical question which counsel, Mr. Prendergast, put to you, you assumed that Mr. O'Brien was thrown to his seat and landed on the gears, did you not? A. I believe that is what he said.

X Q. What? A. I believe that is what he said.

X Q. That is what he asked you to assume, was it? A. I believe it was.

X Q. And your opinion was based on the hypothesis that that is [128] what happened; correct? A. That is right.

X Q. And that the violence which you describe as the trauma that was the adequate cause for the hernia or hernias was being thrown from his seat on to the gears; is that correct? A. That is correct.

X Q. So that if that assumption was not in accordance with the facts, then your opinion you would want to change, wouldn't you? A. Based on the facts that would be given me, yes.

X Q. Yes, that is right. All right. Now, if you would assume that after this contact between the O'Brien truck and the Whitney car that Mr. O'Brien was still on the seat of the truck, then you would want to change your opinion, wouldn't you, that the first contact was the contact that produced the violence which was adequate for the injury? A. I wouldn't change my opinion honestly then.

X Q. You would have to have still the same opinion? A. The same opinion.

X Q. If it means you discarded or disregarded the facts in the hypothetical question that he was thrown from the seat and thrown on the gears—you took that out? A. No.

X Q. Do you want the jury to understand now it would be an adequate cause for the hernia, being thrown from his seat and [129] thrown on the gears— A. He asked for my opinion.

X Q. No, no, is that what you gave your opinion on? A. No, on the collision of the cars.

X Q. On the collision of the cars, without any reference whether he was thrown from the seat and thrown on the gears? A. That is correct.

X Q. Just the collision of the cars? A. That is correct.

X Q. That is the way you want to leave it, that is, on the collision of the cars that would be an adequate cause for the trauma? A. That is correct.

X-Q. And that would be an adequate cause for the hernia? A. That is correct.

X-Q. So that any collision of the cars that took place later, whether it was the collision of the O'Brien truck with the Hobart car or the second collision with the Whitney car, would be an adequate cause? A. That is correct.

Mr. Mahony: That is all.

Redirect Examination by Mr. Prendergast

Q. We haven't asked you about your bill, Doctor, or bills. Will you tell us what your bills are in this case? A. $325 total. First operation, $150; second, $150; and [130] the consultation, $25.

Q. Is that a fair and reasonable charge for the services you rendered in this case? A. Yes, sir.

Q. Now let me ask you this, Doctor. Do you mean to convey to the jury the fact that just because two cars come together a person in it will get a hernia? A. No.

Q. In this case you say this man received these hernias because of this contact, this accident he was in—

Mr. Mahony: He said it was an adequate cause.

Q. —was an adequate cause for it; is that right? A. That is correct.

Q. And will you tell us now fully and completely on what you base that opinion? A. The fact that the patient gives the history that he never had a hernia before the accident and following the accident the swelling appeared in the groin it becomes apparent that accident brought on the swelling in the groin.

Mr. Prendergast: All right, that's all.

Recross-Examination by Mr. Mahony

X-Q. You found no marks of violence in the groin in the first examination, did you? A. No, I did not.

Mr. Mahony: That is all.

[131] Mr. Prendergast: That is all.

The Court: I would like to say to the jury also—certainly there will be no objection on the part of counsel—I will tell you more in detail what expert testimony means in my charge. Counsel are entitled to have me say that. I will say more about it.

[Short recess.]

DR. BARNET BASKIES, Resumed.

Direct Examination by Mr. Prendergast, Continued.

Q. Now let us go back for a minute to this hernia situation. You saw the hernia, did you? A. Yes.

Q. When was it you first saw it? A. At the hospital, the 21st.

Q. That was the time you say you saw the soft mass, did you? A. The hernia.

Q. The hernia, that's right. Let me ask you this. Did you get a history of how this accident occurred? A. No.

Q. But you got a history of his having been in an accident? A. Yes.

Q. Let us assume he was in this automobile accident at the time he was driving this truck, and let us assume he is driving along the highway and has contact with an automobile, as a result of which the wheel is thrown out of the cab and [132] he is thrown so that at some time he finds himself thrown down on the floor of the car over the gears: have you an opinion, Doctor, as to whether or not that type of accident is an adequate cause of the hernia that you found? A. Well, yes.

Q. What is your opinion? A. Well, my opinion is that any blow, especially where such terrific force, a blow of terrific force—

Mr. Mahony: Now, wait a minute. May that go out?

Q. I said nothing about terrific force. Leave out the

question of terrific force. Tell us, please, your opinion. A. That blow in the chest which fractured the ribs, presumably there was a sufficient amount of force that hit the stomach which would cause this type of injury.

Q. What type of injury are you talking about? A. The hernia.

Q. The hernia, all right. Now, then, how long did you treat him during the first visit at the hospital? A. Up to March 6.

Q. You kept seeing him right up to the date he was discharged from the hospital? A. Yes.

Q. Did you see him again after that? A. Yes.

Q. You saw him after that. Let us go back to the date of [133] March 6. Did you send him to some other place after March 6? A. Yes.

Q. Where did you send him? A. Mass. Memorial Hospital.

Q. What was your purpose in sending him there?

Mr. Mahony: Objection.

The Court: I will exclude the question in that form—what was the purpose.

Q. What was the condition he was suffering from and for which you sent him to the Mass. Memorial Hospital on March 5 or 6 of 1953? A. He was sent to the Mass. Memorial Hospital because of the question of a shadow in the right lung.

Q. In other words, it was because of a shadow that was appearing in the lung he was sent into the Mass. Memorial Hospital? A. Well, he was sent because of the fact there was a question at that time about the appearance of a shadow—whether it was a tumor.

Q. Thereafter did you treat him for the lung? A. No.

Q. Have you treated him since then? A. After he came back from the Mass. Memorial Hospital.

Q. When did he come back from the Mass. Memorial Hospital? A. I saw him again April 6, 1953.

Q. Read us the dates you saw him after that. [134] A. April 22,—

Q. Was that the last time? A. No.

Q. Go ahead, read us the dates. A. May 8, 18; June 1st, 15, 19; August 7; September 3, 15; October 1, 30; November 20, 26; December 22, 1953; January 8, 1954; 22nd of January, 1954; March 12; March 8, 19; April 2, 23; May 7; June 4, 22, 1954.

Q. Now, what were you seeing him for after he came out of the Mass. Memorial Hospital? Summarize it. A. Well, he complained of swelling in the legs, could not walk a great deal; had tenderness in the right chest over the surgery area; had some cough; had some swelling beneath the right armpit. That's about it.

Q. All right. Now, do you mean by this cough he had an ordinary cold or not? A. No.

Q. Describe what you mean by this cough that this man was suffering from? A. This man had surgery on his lung which left him with some coughing; in other words, a clearing of the throat and a little cough.

Q. Now, what was your bill for services rendered? A. $699.

Q. Is that a fair and reasonable charge for services rendered? [135] A. Yes.

Mr. Mahony: All right. Oh, one other question.

Q. Are you still prescribing for him, for something to help him, Doctor? A. At the present time, no.

Mr. Prendergast: All right.

Cross-Examination by Mr. Mahony

X-Q. Doctor, this hernia and this hypothetical question that was put to you, do I understand you to say that based on the hypothesis that Mr. Prendergast put to you it is

your opinion the trauma or violence was an adequate cause for the hernia? A. Yes.

X-Q. Did you base your opinion on the facts that he included or the assumed facts in the hypothesis? A. Well, I based it on the hypothesis plus what I knew of the situation.

X-Q. Then, in the answer that you gave, you included other things than the assumed facts which he asked you to assume? A. Yes.

Mr. Mahony: Then I ask that the answer, his opinion be struck out.

Mr. Prendergast: I have no objection to striking it out at this time. I will get it in later.

The Court: What was the basis of the doctor's answer there as to the assumed facts?

[136] Mr. Mahony: I understood him to say he did take into consideration in the answer other matters than the facts which Mr. Prendergast asked him to assume. Now, I understand Brother Prendergast has no objection to his opinion being struck.

Mr. Prendergast: No, no objection, not at the present time.

The Court: All right.

X-Q. All right, Doctor. You say you saw him, among other dates in November, the 26th? A. The 26th?

X-Q. '53? A. November, '53?

X-Q. Yes. A. Yes, I saw him November, 1953.

X-Q. What time in November, 1953? A. November 20, 1953.

X-Q. Have you any notes of that particular visit? A. Yes.

X-Q. Did you make an examination of him that day? A. Yes.

X-Q. What examination did you make? A. Well, I examined him, took his blood pressure and pulse.

X-Q. What were his complaints on that day? A. Had

pain in the right chest above the scar; swollen legs; [137] he could not walk; tires very easily; he seems to be a little short of breath.

X-Q. Did he tell you of having had an accident on November 14, 1953, in which the car in which he was driving collided with another car? A. No.

X-Q. You got no history of that? A. No.

X-Q. By the way, Doctor, you say you have been practising general medicine? A. That's right.

X-Q. For sixteen years? A. Yes.

X-Q. And where did you get your medical education? A. Kansas City University Medical School.

X-Q. Graduated when? A. 1938.

X-Q. You have not specialized whatever in surgery? A. No, sir.

X-Q. Or in X-rays? A. No, sir.

X-Q. Or in chest conditions? A. No, sir.

X-Q. Or lung conditions? A. No, sir.

[138] X-Q. Now, you say that in the first examination you made of him on June 21 you found pain in the left chest; that is one of his complaints? A. Yes.

X-Q. Right? A. Yes.

X-Q. Next was headache; correct? A. What was that question?

X-Q. The second complaint that he said he had was headache; correct? A. I didn't put it in my order. I don't think so.

X-Q. Didn't you? Didn't you say chief complaint: Pain in left chest; headache? A. "Pain in left chest, reoccurring headaches."

X-Q. Headaches, you said? A. Headache, yes.

X-Q. What did you do for the headaches? A. Well, he was getting analgesics, empirin compound with codein.

X-Q. You found no evidence of violence on head, did you?

Mr. Prendergast: What is the use?

A. The head had a laceration. "Laceration 1/2 inch on left frontal area above left eye."

X-Q. Where is that? A. "Lacteration 1/2 inch on left frontal area above left eye."

[139] X-Q. Was that the only kind of violence that you had on his head? A. That's the only violence, yes.

X-Q. And, apart from that laceration, no abrasions, no contusions on his head; correct? A. Well, laceration, laceration over left eye.

X-Q. I say apart from that there were no others on his head? A. No others? No, not that I recall.

X-Q. And so far as the nose is concerned, the X-rays eliminated any fracture of the nasal bone? A. That's right.

X-Q. So far as pain in the right forearm and the right elbow joint the X-rays eliminated any fracture or dislocation in the area? A. That is right.

The Court: Well, we will stop here.

[Recess from 1 p.m. to 2:15 p.m.]

[140] AFTERNOON SESSION

DR. BARNET BASKIES, Resumed

Cross Examination by Mr. Mahony, Continued

X-Q. Doctor, when we recessed we were talking about complaints you found on June 21st. Now, before we ask about the complaints, did you make an examination of him on that day? A. Yes.

X-Q. You have your notes of that examination with you? A. Yes.

X-Q. Will you tell us the examination that you made and what you found? A. (Reading)

"Head: Laceration half inch on left front area above left eye. Concussion of brain, slight. Eyes—Negative.

Ears—Negative. Nose—Abrasion with edema. Question of fracture of nose. Both nostrils filled with blood. Mouth—Negative. Pain in left chest and limitation of motion. Pain in chest on inspiration. Traumatic pleurisy on lip with fracture of 5, 6, 7, 8, 9th ribs? on lip. Rales in whole chest. Right arm and forearm at elbow—contusion with edema and ecchymosis from above elbow joint lateral to midway of forearm with abrasion of area."

X Q. Left side? A. Yes, I believe that was the left side. No, that was the [141] right side because I have here "contusion with abrasion of left elbow joint medial with ecchymosis, edema—"

The Court: What is edema? Tell the Jury.

The Witness: Edema is swelling.

The Court: That is right.

A. (Continuing)

"—and severe pain, tenderness over area of edema and pain on motion in joint. Contusion and abrasion and edema of left hand posteria surface. Fracture? Contusion and abrasion of left knee below joint on leg 'T' shaped. Contusion and abrasion of left ankle, medial area—size of 1 2 dollar. Contusion and abrasion of 1 2 dollar anteriorally, below knee."

X Q. That is the left leg? A. Left leg, below knee.

"Cardiovascular: Negative.

Others essentially negative.

Pain in left groin—left inguinal hernia, direct with pain going up into abdomen."

That is all.

X Q. That is everything that your examination revealed? A. That is right.

X Q. There were no marks of violence in the area of the left groin, were there? [142] A. The only thing was left inguinal hernia.

X-Q. No, there were no marks in that area, no laceration? A. No, no laceration.

X-Q. No abrasions? A. No abrasions.

X-Q. No contusions? A. No contusions.

X-Q. No marks in the abdomen, the lower abdomen; correct? A. That is right.

X-Q. Now, Doctor, if you were to receive an acute inguinal hernia from violence, you would expect to see some marks, would you not? If there was an inguinal hernia following an accident, you would expect to see marks of violence in the area of the groin? A. Not necessarily; no.

X-Q. Wouldn't you ordinarily anticipate it, Doctor, where there is a single act of violence that is the cause of hernia? A. No.

X-Q. Isn't that one of the extremely rare things that occur in medicine: an inguinal hernia caused by a single act of violence? A. No.

X-Q. Isn't that one of the rarest things in medicine? A. No.

143] X-Q. Isn't it? A. No.

X-Q. Well, now, let's see. You heard Doctor Cotta say this hernia was easily reducible, did you? A. Yes.

X-Q. And that is what you found, that it was easily reducible? A. I didn't try to reduce it.

X-Q. You examined it? A. That is right.

X-Q. Yes. And in order for a hernia to occur, does that mean that some of the intestine has to come through into the canal, the inguinal canal? A. Not necessarily, no.

X-Q. What is an inguinal hernia if it isn't the intestine getting into the canal? A. There are two types of inguinal hernias. There is the direct and indirect.

X-Q. Well, it is the direct you have referred to. What is that? A. A direct inguinal hernia is a hernia that breaks out from the—well, from the opening, inguinal

opening, right through to the abdomen and then going down the canal.

X-Q. You say that breaks through. A. That is right.

X-Q. There are one or two rings in that inguinal opening. A. There is the inguinal ring and the abdominal ring.

[144] X-Q. By direct hernia, do you mean it comes through either of those rings? A. Yes, I would feel that it did.

X-Q. So that if the ring had already opened to the point where the hernia could come through, you could easily push it back through the ring?

Mr. Prendergast: Excuse me. Has there been any testimony of that kind here?

Mr. Mahony: It's whatever the Jury remembers. Your memory may be better than mine and mine better than yours.

X-Q. But whatever the size of the hernia that Doctor Cotta—well, let's get it from your memory. How large do you say the hernia was? A. The size of possibly a small orange.

X-Q. A tangerine? A. There are different size tangerines.

X-Q. All right. Whatever the size of it was, that ring through which it came had previously been enlarged to let the hernia come through and be easily pushed back; is that correct? A. It was large enough so it came through.

X-Q. Yes. That opening was large enough to let it come through and be easily pushed back; that is correct; isn't it? A. I don't know about pushing it back. A. I say.

X-Q. You heard Doctor Cotta say it was easily reduced? A. Yes.

[145] X-Q. That meant it could be pushed back in place? A. Yes.

X-Q. That meant that ring had been enlarged prior to

this time to the extent that it permitted the hernia to come through and be pushed back? A. Yes.

X-Q. That would take some time, wouldn't it, to have the ring enlarged to that size? A. Not necessarily.

X-Q. Isn't it your experience in connection with hernia cases it is a series or succession of events that produces hernia? A. No.

X-Q. Such as heavy lifting; isn't that one of the things? A. No, heavy lifting, lifting one thing would cause it to break through.

X-Q. Could possibly break it through, you say? A. Yes.

X-Q. How many hernia cases have you had, Doctor, in your practice? A. Well, in round figures I couldn't say, but there was a good number.

X-Q. When you say a good number, what do you mean? A. Well, it would be very hard to estimate.

X-Q. That is about as definite as you want to put it? A. No, that's about all I can say.

X-Q. Never operated on one, did you? [146] A. No, I have never done that surgery, I assist in surgery.

X-Q. Well, in addition to that, Doctor, if a hernia, acute hernia, is to result from one act of violence, you say that you wouldn't anticipate that there would be marks of violence on the outer part of the body? A. No.

X-Q. There is one symptom which follows almost as a matter of course, isn't there: vomiting, if there is acute hernia? A. No, not necessarily.

X-Q. Again you say not necessarily. Isn't it one of the most common things in acute hernia: vomiting? A. No.

X-Q. In any event, you found no evidence of vomiting in this case, no history of vomiting, did you? A. No, he didn't give me a history of vomiting.

X-Q. Did you check with the Emerson Hospital, Doctor? A. Did I check with them?

X-Q. Yes, did. A. At that time, during

X-Q. I just asked you, did you check with them at any time; Doctor? A. Yes.

X-Q. Did you get a copy of the Emerson Hospital record? A. All we were interested in—

X-Q. No, did you get a copy of the Emerson Hospital record? [147] A. No.

X-Q. Did you think it was of any importance? A. Not to me; no.

X-Q. The place where he first went and was first treated, and where he made any complaints? A. No.

X-Q. Well, you never got a copy of that Emerson Hospital record? A. No, I did not.

Mr. Mahony: Have you that record, Mr. Prendergast?

Mr. Prendergast: I don't know. Wait a minute.

Mr. Mahony: Is the Emerson Hospital record here?

(Young lady in court hands record to Mr. Mahony.)

X-Q. The Emerson Hospital record, No. 25706; name, address, occupation; date and hour of admission, 6 21 52, at 1:30 p.m. Diagnosis: Abrasion, contusion both patellae —that's the knee caps; is that correct? A. That is right.

X-Q. Left elbow, left temple, fractured ribs. Correct? A. That is right. That is what the record says.

X-Q. And that is the diagnosis there where he first went, isn't it? A. That is right.

X-Q. No evidence there of any inguinal hernia, is there? A. No.

X-Q. Then the treatment: DSD. What does that mean? A. I don't know.

[148] X-Q. "Chest stripped. X rays both elbows, both knees and ribs." Correct? A. Right.

X-Q. "Dr. Forbes." A. Right.

X-Q. When you say you didn't get in touch with the Emerson Hospital, I assume you didn't get in touch with Doctor Forbes, either? A. That is right.

Mr. Mahony: Then, in the X-ray report of the Emerson Hospital, No. 19105, dated June 21, 1952:

"Both elbows, both knees: Pathology appears to be confined to the soft tissues. There is no evidence of fracture or other bony injury.

Ribs: There is a complete transverse fracture of the left fifth rib in the midaxillary line. There is good apposition and alignment of fragments. There is no evidence of underlying pathology."

X Q. Now, I have read the whole report, haven't I? A. Yes.

Mr. Mahony: Now, on the Emerson Hospital letterhead, dated June 26, 1952, signed by Dr. Wilfred W. Forbes, to Mr. O'Brien:

"On June 21 you were informed at this hospital after examination and treatment of your injuries, that the X-rays showed no fractures. This report [149] was made after examination of the wet films.

Re-examination of the films after they had dried showed a transverse fracture of the left fifth rib in the midaxillary line. There was no displacement of the fragment. The treatment which we instituted is not in any way altered by the report. I do think, however, that you should inform your personal physician of the later findings.

Both elbows and both knees, as you know, sustained no bony injury."

X Q. Did Mr. O'Brien deliver that letter to you? A. He showed that to me, yes.

X Q. Now with reference to the arm and elbows, those complaints of pain that he had in these areas terminated when? A. Oh, I imagine normally they would terminate in a couple of weeks; ten days or a couple of weeks.

X Q. Ten days to fourteen days? A. Yes.

X-Q. As far as abrasions below knee, on the left leg, when did that terminate? A. About the same time.

X-Q. And the swelling below the knee on the left leg, the same length of time? A. Yes.

[150] X-Q. And the abrasions of the right knee, below the knee, the same? A. Yes, just about the same.

X-Q. So is it fair to say, within two weeks after the accident, whatever abrasions or lacerations or contusions he had had cleared up? A. Yes.

X-Q. So far as the strapping which he had put on at the Emerson Hospital on June 21, you took that off, did you? A. Yes.

X-Q. Was that because you felt that the ribs would heal up more quickly? A. There was no strapping on the ribs.

X-Q. Where was the strapping? A. Well, the strapping was over the knees.

X-Q. Over the knees? A. Yes, over the abrasions.

X-Q. So that you took the strapping off the knees? A. Yes.

X-Q. He had nothing around the chest, around the ribs? A. No.

X-Q. And the treatment for that was to let the ribs heal naturally; is that correct? A. That is what Doctor Ferrand, the chest man, suggested.

X-Q. And that's the treatment that you followed? [151] A. That is right.

X-Q. Now the ribs were in good alignment, good apposition? A. Well, according to the X-ray report.

X-Q. Yes. That means that when you have good alignment in the outline of the broken bones, or the broken ribs, it is as it was before; correct? A. Well, what do you mean, as it was before?

X-Q. If you have two pieces of pipes, for instance, and they are separated, the alignment, the outline of each pipe would be in the same line? A. Yes.

X-Q. So that when they unite, they are in that same alignment; right? A. I think there was one rib that wasn't in good alignment, but I think the others, presumably they adhered all right.

X-Q. So far as ribs uniting is concerned, the breaking of a rib and then the healing, how long a time does that ordinarily take? A. It varies with the individual.

X-Q. Well, in this particular case, how long did it take? A. Well, in this particular case, if I remember correctly, on January 6, 1953, the rib cage is symmetrically developed, there are numerous fractures all healed below the left rib cage.

X-Q. That is, all healed; but when did that take place? A. I would say about that time, close to it.

X-Q. So that by that time the ribs had united and long prior to [152] that time all signs of abrasions, lacerations, and contusions have disappeared? A. That is right.

X-Q. Well, now, when you had the first X rays taken of the chest, so far as the left lung is concerned, and the right lung, the areas were clear? A. I assume it is good because of the fact—

X-Q. You have the report there on the first X ray. A. First X-ray June 21.

X-Q. Yes. As to the lungs now. A. According to this, the lungs were all right.

X-Q. Yes. And on July 9, 1952, the second X-ray report or the X-ray that was taken July 8, the lungs were all right? A. July 9, the best lateral view taken July 8, there is still a considerable amount of fluid in base.

X-Q. And the right lung was all right? A. Right lung is all right.

X-Q. And the next X ray, which was taken on July 11 and the report July 14? A. It doesn't refer to the right lung.

X-Q. So that certainly up to this time there was no evi-

dence of any pathology in the right lung? A. That is right.

X-Q. No evidence of any injury to the right side of the chest or right side of the body; is that correct? [153] A. The right side of the body, yes, but not the right side of the chest.

X-Q. But not the right side of the chest? A. That is right.

X-Q. Were you present when the taps were made by Doctor Farrand? A. I believe I was only present when he injected the cocaine along the rib course.

X-Q. You were not present at any of the other occasions? A. No.

X-Q. Does the hospital record show those taps? A. Yes.

X-Q. May I see them, please? A. Yes (handing).

X-Q. (After perusing) Now that isn't any record of a spinal tap being done, is it? A. That is June 24th. That's the time—

X-Q. No, I have asked you for the hospital record covering the taps made by Doctor Farrand. A. Oh, you want the hospital record?

X-Q. Yes. July 3, 7, and 11, I think you gave us the dates. A. Here it is, sir. Thorocenteses performed by Doctor Farrand.

X-Q. Is that classified as an operation? A. That's up to the chest man.

X-Q. Is there any operation sheet that notes that? A. There is no operation sheet of that nature.

[154] X-Q. All it says is—

Mr. Prendergast: That's what they call giving them the needle, I guess!

X-Q. It says thorocenteses performed by Doctor Farrand and 2900 cc of bloody fluid extracted; is that right? A. That is right.

X-Q. Now that is all there is on that? A. Yes. Penicillin injected.

X-Q. And the next one on July 7th.

Mr. Prendergast: Excuse me. Did you say 2900 cc is withdrawn?

The Witness: 2900 cc removed—that's right.

Mr. Prendergast: Before, somebody said 650.

Mr. Mahony: That's different dates.

Mr. Prendergast: I'm glad you brought that out. What was that again?

The Witness: There were 2900 cc bloody fluid removed.

Mr. Prendergast: How many quarts is that?

The Witness: There are two pints to a quart. A thousand cc would be a quart. So, presumably, that would be three quarts.

X-Q. The next one is July 7th. A. Thorocenteses performed by Doctor Farrand and 600 cc bloody fluid obtained. [155] X-Q. That is all there is on that? A. That is right.

X-Q. No operation report sheet such as appears on the hernia? A. That is right.

X-Q. Now, the 11th. A. This is by Doctor Farrand.

X-Q. Visited by Doctor Farrand. So there is no reference there to any tapping on July 11th, is there? A. No, there was no tapping done at that time by Doctor Farrand, according to his notes and according to the hospital report.

X-Q. So there are only two taps; is that correct? July 3d and July 7th? A. July 3d, July 5th, and July 7th.

X-Q. Three taps? A. Three taps.

X-Q. And those were all done on the left side of the chest? A. That is right.

X-Q. The left lung? A. That is right.

X-Q. None on the right? A. That is right.

X-Q. Now I think you spoke in the history of visits he made to your office beginning July 28, 1952. Is that right? A. July 28, 1952.

[156] X-Q. What did you do to him that day at the office? A. I gave him diathermy in the chest.

X-Q. To what part of the body? A. To the chest, left chest.

X-Q. Is that all you did for him that day? A. That is right.

X-Q. Do you have your notes of that there? A. That is right.

X-Q. You do? A. Yes.

X-Q. On July 30, what did you do for him? A. I gave him a diathermy treatment.

X-Q. August 4, 7, 9, 11, 14, 16, 17, 20, 23, 25, 28, and 30—what did you do for him on those trips? A. About the same thing, with the addition, of course, with medication as needed.

X-Q. Have you any notes of what you did for him on those dates? A. Oh, yes.

X-Q. What did you do for him on those dates? A. All right. Diathermy; diathermy. Well, basically, I gave him diathermy treatments.

X-Q. All to the left chest? A. Yes.

X-Q. And through September 2, 4, 6, 8, 11, 13, 15, 18, 20, 22, 24, 27, 29th—what did you do for him on those visits? [157] A. During all of these periods I charged to him for his visits to the office, I gave him diathermy treatments and gave him medication—in other words, I gave him such treatment as I thought he needed at the time.

X-Q. Diathermy and medication; is that right? A. That is right.

X-Q. And all through October—2nd, 4th, 6th, 9th, 11th, 13th, 16th, 18th, 20th, 23d, 25th, 27th, and 30th—the same? A. I think at that time I also gave him some kind of medicine because of the cough that he had developed at that time.

X-Q. That cough he had all through 1952? A. Yes.

X-Q. How many times did you treat him for the cough in that month? A. Well, each time he came in, I made sure he had cough medicine; if he didn't I would give him a prescription for it or else change the prescription he was taking.

X-Q. Now on November 1st, 4th, 7th, 10th, 13th, 15th, 17th, 20th, 22d, 24th, 28th—what did you do for him on those dates? A. Well, just about the same. At that time he wasn't coughing too much, so presumably I cut down on the cough medicine.

X-Q. Is that true of all the visits he made in December? A. Yes.

X-Q. Well, now, in all that time you were giving him primarily diathermy for the left chest? [158] A. That is right.

X-Q. What was the purpose of the diathermy applied to the left chest? A. That increases blood supply and helps the healing process to heal better.

X-Q. To help th. healing process? A. Help the healing process.

X-Q. Help the bone? A. That's right.

X-Q. Help the healing of the bone, the ribs? A. The ribs.

X-Q. And you felt it was necessary for him to make these visits to your office for their treatment? A. That is right.

X-Q. There was nothing in his condition which would prevent him from going to your office, was there? A. No.

X-Q. And so far as you could see, he was able to get to your office from his house and get back to his house from your office? A. Yes.

X-Q. Where did he live? A. Oh, on Kenmore Road.

X-Q. Yes. Where was that? A. Oh, I would say one, two, three, four—about four or five [159] blocks away.

X-Q. From where you were, where your office was? A. Yes.

X-Q. You understood he walked to your office and walked back? A. No, not necessarily.

X-Q. Did he tell you how he got there at any time? A. No.

X-Q. Now during this period there was nothing that attracted your attention to his right lung or the right side of his chest, or warranted you in giving any treatment to that side of his chest? A. No.

X-Q. That is correct, is it? A. That is correct.

X-Q. Have you any notes with reference to his weight? A. His weight?

X-Q. Yes. A. No.

X-Q. So that you have no note of his weight at any particular time or any loss of weight; that is correct, isn't it? A. No.

X-Q. You have no note of any lost weight? A. No, I have no note of it; no.

X-Q. And if you knew of any loss of weight you thought was significant, you would make a note of it, wouldn't you? [160] A. Well, what do you mean by significant?

X-Q. Well, that required any attention on your part, that struck you as unusual or abnormal and required any attention, you would have made a note of it, wouldn't you? A. Yes.

X-Q. Now, so far as this wrist condition is concerned, was that his left wrist? A. What condition?

X-Q. From the X-ray report you learned, did you not, that he had fractured his wrist several years before? A. Yes, I think he told me that later on.

X-Q. How long before had he fractured it? A. I don't recall.

X-Q. Am I right in understanding that the first time that your attention was called to his right chest or right

lung was around February 25, 1953? A. What date was that again?

X-Q. February 25, 1953. Let me strike that out. On February 25, 1953, the fields of the lung were clear, were they?

Mr. Prendergast: Which lung are you talking about?

Mr. Mahony: The lungs.

X-Q. Well, that was about the time he was referred to the Mass. Memorial. A. Yes, he was referred to the Mass. Memorial—

X-Q. On March 6th? [161] A. —on March 6, 1953.

X-Q. That's when he went to the Mass. Memorial? A. Yes.

X-Q. Was it just before that? A. I have an X-ray report here, February 25.

X-Q. Yes. A. (Reading)

"Impression: The density described in the right midlung field could well represent a bronchogenic carcinoma—"

X-Q. That is the first time your attention was called to the right lung, was it? A. I think it was a little before, when he started with pain in that lung.

X-Q. Still in the month of February? A. Yes.

X-Q. All right, Doctor, I think in some of your testimony you referred to an arthritic condition shown in the X-rays. A. The X-ray reports showed arthritis, yes.

X-Q. And in what parts of his body? A. (Reading)

"There are hypertrophic osteoarthritic changes of the 4th and 5th lumbar vertebrae."

X-Q. Any others? A. (Reading)

"There are marked hypertrophic osteoarthritic changes of the left wrist with almost complete [162] bony fusion of the carpal bones . . .

"There are marked hypertrophic osteoarthritic changes with bony spurring and lapping and narrow-

ing of the left shoulder joint and the left acromioclavicular joint.''

X-Q. The acromioclavicular joint is what? A. Right around there (pointing).

X-Q. Where else? A. (Reading)

''There are also hypertrophic osteoarthritic changes of the left elbow joint.''

That is all there is on the report.

X-Q. When you say hypertrophic arthritis, that's what the ordinary person calls rheumatism? A. Well, not necessarily.

X-Q. Well, it interferes with the joints, does it not? A. To some extent, yes.

X-Q. Adequate in itself to cause pain? A. No, not necessarily.

X-Q. Increases the pain? A. I imagine it does.

X-Q. You imagine it does? That's as far as you want to go? A. It does—all right.

X-Q. What? A. It does.

X-Q. It progresses, does it not? It increases? [163] A. Yes.

X-Q. If it becomes painful, it becomes more painful as it progresses? A. If it is painful, yes.

Mr. Mahony: I think that is all.

Redirect Examination by Mr. Prendergast

Q. Doctor, what do you mean by diathermy? A. Diathermy is a process of—

Q. Baking? A. It's baking, yes.

Q. Now what was the fluid in the left lung due to? A. The fluid in the left lung was due to the injury and fracture of the ribs, and with the fracture of course you have injury of the tissue around the ribs, therefore you have an increase of fluid there. In this instance where

there was bloody fluid, presumably some blood vessels were broken.

Q. Some blood vessels inside were broken by the injury? A. That is right.

Q. Which got into the left lung, is that right? A. Yes.

Q. Now I want to ask you this hypothetical question. Assume that Mr. O'Brien was in this truck, and assume he was driving along Route 2 and his truck was struck or in contact with another automobile, as a result of which he received a number of fractured ribs you have described here, and thereafter these [164] hernias were found: have you an opinion, Doctor, as to whether or not that automobile accident I have mentioned was an adequate cause for the hernia condition that you found?

Mr. Mahony: Objection.

The Court: Well, if he is asked if he has an opinion, he can say yes or no. You wouldn't have any objection to that answer?

Mr. Mahony: I object to it now at this time of his examination because the other one was struck out, the opinion he gave based on what he took into consideration.

The Court: I will allow it.

Q. Answer the question.

The Court: It is within the orbit of the Court's discretion.

A. Yes.

Q. What is your opinion? A. My opinion is that the hernias definitely are due to the blow, the injury he received.

Mr. Mahony: I ask it be stricken out.

Mr. Prendergast: I ask it stay in.

The Court: No, I will allow it to stand.

Mr. Mahony: Objection.

Q. Will you tell us why you say that? A. Well, the man was struck with such force as to break ribs, increasing

pressure in the chest, therefore increasing pressure [165] in the abdominal cavity, which in my estimation may cause the hernias.

Q. That is, that did cause the hernias? A. Caused the hernias; right.

Mr Prendergast: All right. That's all.

Recross Examination by Mr. Mahony

X-Q. Do I understand you to say, Doctor, that the hypothesis you take, or that the opinion you give, is based solely on the hypothesis that Mr. Prendergast put to you? A. Yes.

X-Q. And you have not taken into consideration certain other factors? A. No.

X-Q. Is that right? A. Yes.

X-Q. Well, you would say, would you not, that if this man were sitting on the seat after this collision with the Whitney car—

Mr. Mahony: Strike that out.

X-Q. If this man were sitting on the seat of his truck at the time his truck was in collision with the Hobart car, and he continued on the seat until the truck was in collision with the Whitney car, you wouldn't be able to say which collision was the cause of the injury, would you?

Mr. Prendergast: Objection.

The Court: I will admit it.

[166] Mr. Prendergast: Exception.

X-Q. You couldn't tell, could you?

Mr. Prendergast: Now, wait a minute now. I assume this testimony he is putting in in this hypothetical question is going to be introduced, and on his promise to do that, you are admitting it?

The Court: I admit it upon the assumption, Mr. Mahony, that you will have evidence from which the Jury

could find he remained in an upright position and in control of the car.

Mr. Mahony: In an upright position on the seat.

The Court: That is right. And the truck went into another automobile.

Mr. Mahony: Yes.

The Court: I will admit it. You don't object to that?

Mr. Prendergast: If that testimony is introduced, I will withdraw my exception later.

The Court: All right.

X-Q. You wouldn't be able to tell which collision caused it, would you? A. No.

Mr. Mahony: That is all.

Redirect Examination by Mr. Prendergast

Q. Is it necessary for the man to have been thrown off his seat to get this hernia, in your judgment?

[167] Mr. Mahony: Objection.

The Court: I will admit it.

A. No.

Q. All right. Why? A. Well, you can fit yourself on the chest or anywhere else and still sit on the seat but coming forward.

Q. By hitting what? A. By hitting your chest or your stomach.

Q. Hitting your chest against the wheel? A. Right, sure.

Q. And then sit right back and stay there? A. Yes.

Recross Examination by Mr. Mahony

X-Q. Again, Doctor, assuming he did all that at the time of the first collision with the Hobart car—

Mr. Prendergast: There is no evidence of that.

A. Possibly.

Mr. Prendergast: Leave the answer out until I get through with my objection, will you?

X-Q. That is correct, isn't it? You are assuming all that happened by the contact between the O'Brien car and the Hobert car, the first collision?

Mr. Prendergast: No, wait.

Mr. Mahony: Make up your minds!

X-Q. That is right, isn't it? [168] A. Well, I assume that he was hit in the chest. Which one did it, I don't know.

Mr. Mahony: That is all.

The Court: That is for the Jury to find out.

The Witness: That is right.

Mr. Mahony: That is all, Doctor.

Mr. Prendergast: Thank you, Doctor.

Doctor Burke, will you come forward, please.

DR. EDWARD NEWELL BURKE, Sworn

Direct Examination by Mr. Prendergast

Q. Your name is what? A. Edward Newell Burke.

Q. You live where? A. 22 Welgate Road, West Medford.

Q. Your business or profession is what? A. Physician.

Q. Specializing in what? A. Radiology.

Q. Meaning what? A. Meaning the interpretation of X-rays and the treatment of patients by X-ray.

Q. You are a graduate of what school? A. Holy Cross College and McGill University.

Q. When? A. 1942.

[169] Q. Which one in 1942? A. McGill University.

Q. But you are a graduate of Holy Cross College when? A. 1938.

Q. Since then you have been doing what? A. I studied for a year in pathology at the Boston City Hospital. I was pathologist for the United States Army from 1943 to 1946. I had a residency in radiology in Sims Hospital, in Salem, Massachusetts, from 1948 to 1951; from 1951 up to the present time, I have been associated with the Mass.

Memorial Hospital as assistant radiologist and associate radiologist at the present time.

Q. Now let me ask you this: Can you see a fracture in a wet X-ray? A. Yes.

Q. Now you have been furnished with some X-rays relating to Michael O'Brien, have you? A. Yes.

Q. Have you those X-rays here? A. I have (producing).

Q. Now will you please put the earliest X-ray in the picture and interpret it to the Jury, and then carry on with each X-ray right on up through. A. This (indicating) is an X-ray of the thorax.

Q. The date is what? [170] A. The date on this is Emerson Hospital, Concord, Mass., 6, 21, and a dash 5, and the last number is cut off. The number of the film is 19105.

Q. Now tell us what it shows. Interpret it for the Jury. A. This is an X-ray of the bony thorax or chest, and here we can see the ribs of both sides. We can see the heart shadow here. This is the right diaphragm. This is the left diaphragm here. We can see the aerated lung on the right side and the aerated lung on the left side. On the left side, somebody has marked over the—1, 2, 3, 4—5th rib here in this area with a lead pencil: "A recent fracture of the left fifth rib."

Q. Did you do that? A. I did not.

Q. That was on there when you got it? A. That was on the film.

Q. All right, go ahead. Is there anything else? A. There is some slight increased density in the left lower lung field, which we can see right in here, which has the appearance of a pneumonic process.

Q. Meaning what? A. A contused lung.

Q. A contused lung? A. A bruised lung.

Q. A bruised lung? A. Yes.

[171] Q. Anything else? A. We can see there are osteo-

arthritic changes in the—this is called the dorsal spine, the spine associated with the ribs; we can see there are arthritic changes, bony spurs which project out from the so called articular spaces, the clear spaces which we can see between the vertebral bodies here are the articular spaces, the invertebral spaces, and on the side we can see changes representing hypertrophic arthritis.

Mr. Prendergast: Your Honor, we have agreed to do something unusual. After he gets through with each X-ray picture, Mr. Mahony has agreed to take him so we don't have to keep coming back and forth later.

The Court: That will be all right. I think it would be most informing to the Jury, too.

Cross-Examination by Mr. Mahony

X-Q. Now, Doctor, in that X-ray will you point out the 5th rib left? A. Here is the first, second, third, fourth, fifth.

X-Q. And do you find any fracture there of the rib? A. There is a fracture of the left rib.

X-Q. Do you find any fracture of any other rib on the left side in that X-ray? A. The ribs on the very outside of the chest here have been cut off. They have not been included in the history.

X-Q. So far as the right lung is concerned, you see nothing [172] abnormal with respect to that? A. It appears to be all right.

Direct Examination by Mr. Prendergast, Resumed

Q. All right. Now go on to the next picture.

The Court: Are you all through with that one?

Mr. Prendergast: Oh, sure.

The Court: Any question you want to ask further?

Mr. Prendergast: No, no.

Q. Now the next one. A. This is still No. 19105, left, taken on 6/21/52. This is a film of the left elbow—

Mr. Mahony: The number?

The Witness: 19105.

A. (Continued) This shows no evidence of fracture. It does show a little bit of hypertrophic arthritis, or osteo-arthritis—another name for it.

Mr. Prendergast: Anything there?

Mr. Mahony: No.

Q. Go on to the next one.

The Court: These were all taken at the Emerson Hospital?

Mr. Prendergast: At the Emerson Hospital at the date stated.

A. This is another film, No. 19105, dated 6/21/52, of both knees, again showing minimal arthritic spurring of the right [173] knee. The left knee looks all right.

The Court: Any questions with reference to it?

Mr. Mahony: No.

Q. Now the next one. A. These are lateral views of the knees. This is the right knee and this is the left knee. There is no evidence of fracture.

Q. That completes the Emerson Hospital, does it? A. Yes.

Q. Now let us get those out of the way. What is the next one? A. This is an X-ray of the chest from the Saugus General Hospital, Saugus, Mass., with the name "Michael O'Brien" imprinted on it. The X-ray number is 1853, and the date is 7/2/52. On this film we can see now there is an area of increased density as compared with the old film as shown from the Concord Hospital; this one only shows a small contused area of the left lung.

Mr. Mahony: That is the left lung?

The Witness: The left, yes. Now we can see that the lower half of the left lung field is completely obscured by fluid within the left pleural cavity. We can see the fluid

has increased, and this is called the lateral portion of the chest here. The right lung field is entirely negative. Now here, if you look carefully, we can see there are—1, 2, 3, 4, 5th, 6th—the 7th rib is fractured, the 8th rib is fractured, the 10th rib down here is fractured.

[174] Q. Now go back and tell us all the fractures again so the Jury gets them. A. The fractures at this point are: the fracture of the fifth rib, which was seen in the Concord film, is not evident at this time; but there is a fracture of the —1, 2, 3, 4—the sixth rib, the seventh rib, and the —I believe I might have said the eighth rib.

Q. The tenth. A. If I said the eighth rib, I don't see the fracture of the eighth rib.

Q. Is there anything further about that you want to describe to the Jury?.

The Court: I think you said the tenth rib.

Q. Is that so? A. The tenth rib is fractured.

Q. You see the tenth now? A. Yes.

Q. Go ahead. A. The right lung field is entirely clear.

Mr. Prendergast: Do you want to take it now?

Mr. Mahony: All those ribs were fractured on the left side?

The Witness: On the left side.

Q. Go on to the next one. A. Again, Saugus Hospital, Michael O'Brien, No.—I believe [175] it is 1857; dated 7/7/52. Now if you could see the previous film at this point, you would see the fluid extended to this level, and now there has been some decrease in the amount of fluid in the left pleural cavity. There does not appear to be anything remarkable in that lung. The right lung field does not appear remarkable.

The Court: What date is that?.

The Witness: 7/7.

The Court: And the date of the other one was when?

The Witness: 7/2.

Q. When you say remarkable, what do you mean? A. Remarkable in the underlying pathology.

Q. Do you see any fractures of the left ribs that are shown in that picture? A. No. This is not a good film. It does not show fractures.

Mr. Prendergast: All right. Do you want it?

Mr. Mahony: Yes.

Cross Examination by Mr. Mahony

X-Q. With reference to fluid that you said was in the left lung, there is considerably less than on the first X-ray? A. I said it was in the pleural cavity and that it has decreased from the first X-ray—yes, sir.

X-Q. By pleural cavity, do you mean that lung? A. No, sir.

X-Q. You mean between the lung and the rib cage? [176] A. Yes, sir.

X-Q. So this liquid is not in the lung at all? A. No.

X-Q. Now, the diminution or decrease in the amount of fluid means, I suppose, that it had been absorbed by the body? A. Not necessarily. It could have been tapped.

X-Q. Yes. And this is dated when? A. 7/7/53.

X-Q. And the other one was July 2d? A. July 2d.

Direct Examination by Mr. Prendergast, Resumed

Q. Now the next one, Doctor. A. This is a film of Mr. O'Brien's. There is no number or no date on it. And in this, in comparing it with the film which I just showed you, there has been a slight decrease in the amount of fluid.

Q. There is a slight decrease.

Mr. Mahony: The date of that?

The Witness: No date appears on the film, and there is no number on the film.

Q. Do you see any fractures, Doctor? A. Well, on this film we can see the ribs best of all, and there are fractures of the fifth, sixth, seventh, eighth, and tenth ribs.

Q. Anything else abnormal, or remarkable, as you say? [177] A. No. The right lung is perfectly clear.

Mr. Prendergast: Have you anything to ask?

Cross-Examination by Mr. Mahony

X-Q. Now, Doctor, you say there was a slight decrease of the fluid in the pleural cavity? A. There is less fluid on this film than there was in this one.

X-Q. And have you seen this man yourself? A. I have seen him in the hospital as a patient.

X-Q. Can you tell us the cubical content of the pleural cavity of either side of the— A. It is fairly large, and in order for fluid to be seen in the lung at all, there has to be at least 500 cc's of fluid, and I would say that the chest cavity itself would probably hold up to three or four, possibly, liters of fluid.

X-Q. Three or four liters? A. Yes.

X-Q. It that about the same as three or four quarts? A. Yes, it is.

Directed Examination by Mr. Prendergast, Resumed

Q. Go on to the next one. This film is in the name of Michael O'Brien, No. 2390, dated July 6, 1953; and this film shows the fluid to have been entirely absorbed. There is some pleural thickening of his pleura, which is the tissue which covers the lung and lines the inside of the chest cavity itself, shows [178] some thickening in this region. It is what we called old pleural thickening.

Q. Meaning that when you say it is old pleural thickening; what do you mean? A. It means that there has been some reaction within this covering and organization repair has taken place to thicken it.

Q. Some damage in the lung has been repaired—is that it? A. Some damage to the lung, yes.

Q. Anything else? A. The right lung at this time is perfectly negative; the diaphragms are perfectly nega-

tive; the heart is of normal size and contour.

Mr. Prendergast: All right, Mr. Mahony.

Cross Examination by Mr. Mahony

X-Q. Let me follow that up, Doctor. So far as that particular cavity is concerned in the left lung, that pleural cavity, is that entirely separated from the right pleural cavity in the right lung? A. Yes, sir.

X-Q. You say that the fluid was about three liters, three quarts? A. Yes.

X-Q. So that if there were three quarts of this fluid, it would entirely obscure the pleural cavity; is that correct? A. Yes, sir.

Direct Examination by Mr. Prendergast, Resumed

[179] Q. Take the next one. A. This film, with the name of Mr. O'Brien, No. 2436; the date, 2/13—I think it is 1953. Now on this film we can see again the old pleural thickening on the left lateral chest, right over here, you have density in here. We can see that the left diaphragm is perfectly normal. The left lung field aside from that is not remarkable.

Q. Does that thickening mean there is a scar there?

Mr. Mahony: Wait a minute. Objection.

Q. What does that thickening mean in regard to repair? Can you describe it in layman's language instead of fashion? A. Well, it could be called a scar.

Q. Go ahead. What about the right lung? A. Here is the right lung field, and in this one we can see there is some, what we call, thin increase in density; there is some whiteness here which was not present in the film in January which I just showed you.

Q. Or any of the other films? A. It was not present in any of the other films.

Q. This is the first time we saw it? A. Yes.

Q. Go ahead and tell the Jury about the chest. A. This is an area which represents a pneumonic process.

The Court: Tell the Jury what that is.

The Witness: It is a condition going on within the [180] lungs, which could be pneumonia, which could be an infaret,—

Q. Meaning what, infaret meaning what? A. Meaning there has been some invasion of the lung.

Q. Meaning what? A. Blood clot.

Q. That's what we want. Go ahead. A. And as a result a part of the lung has been damaged, and this (pointing) is a manifestation of the damage, which also could be due to tumor.

Mr. Prendergast: Go ahead. Have you anything to inquire?

Cross Examination by Mr. Mahony

X-Q. That was taken what date, did you say? A. This was taken on February 13, 1953.

X-Q. That is the Saugus Hospital? A. That is the Saugus Hospital.

X-Q. Which is the left lung? A. This (pointing) is the left lung here.

X-Q. And the right? A. And the right lung here.

X-Q. And the area that you pointed out? A. The area of increased density is right in here. It is this area in here. I can put the whole film up and show it to you on this. It might be easier to see. (Produces film.) I can reverse the X-ray film so that this is the right lung field. [181] Here is the right lung field here. If you compare the density of the film, that is, the blackness or whiteness in this area here, you would find or you will see there is increased density here,—in other words, increase in whiteness, which means there is some process going on in the lung which prevents the passage of the X-ray so that

the film is not—it is not getting the same reaction as it did in this one.

X-Q. Now let me get at this one. In taking any film, is the person lying down on the table, when these were taken? A. When a chest film is taken, it is generally taken in an erect position, standing up.

X-Q. Then you have your film in a case either before the patient or behind the patient? A. Yes, sir.

X-Q. And you have the tube, the X-ray tube—the patient is between the plate and the X-ray tube? A. Yes, sir.

X-Q. Depending upon the length of exposure to the ray depends the depth of color in the X-ray itself? A. Yes, sir.

X-Q. The longer the exposure, the darker the dark parts? A. Yes.

X-Q. And the less the exposure, the whiter are the white parts? A. Yes, sir.

X-Q. Now if you would put up that film there. So far as the [182] earlier film is concerned, all the dark parts are darker than in the later film, are they not? A. Well, I would say the films are approximately of the same contrast quality, that is, about the same degree of exposure for each.

X-Q. This is lighter, is it not, all through, the lighter parts, than the earlier film? A. No, I wouldn't say that there is.

X-Q. And the darker parts are darker than in the later film? A. No, I wouldn't say that.

Mr. Mahony: All right.

Direct Examination by Mr. Prendergast, Continued

Q. The next one, Doctor. A. This is a lateral view; that is, the patient stands with his side toward the X-ray film.

Mr. Mahony: Same date?

The Witness: Same date. Michael O'Brien, No. 2468; date, 2-13-53. This is more difficult for the layman to

interpret, but this process which we saw previously is located in this area here, which is called the apical portion of the lower lobe. It is just an anatomical film.

Mr. Prendergast: Anything?

Mr. Mahony: No.

Q. Now the next one. A. Now this is a film of Michael O'Brien, No. 2468, dated [183] 2/23/53. This film again shows no essential change in the appearance of the left lung field. The density which I just described to you in the left lung field shows what we call more—is what we call more confluent, that is, somewhat denser and closer together; in other words, some of the reaction which we saw up here has disappeared and the reaction in the central portion is a little bit more denser and a little bit more sharply defined, that is, we can see the edges a little bit better than we did before.

Mr. Prendergast: Your witness.

Mr. Mahony: That is all.

Q. The next one. A. This is a gastro-intestinal series—

Mr. Prendergast: We don't want to see those, do we? Do you want it?

The Witness: There is nothing to them.

Mr. Prendergast: All right.

The Witness: Those are all the pertinent films in the hospital.

Q. All right. You have some from the hospital where you are connected? A. I have some from the Massachusetts Memorial Hospital.

Q. All right. Take those and begin with the earliest date and interpret them for the Jury, and point out the abnormalities. A. This is an X-ray film from the Mass. Memorial Hospital, with [184] the name Michael O'Brien, No. 71954, taken on 3/7—March 7, 1953. On this the left lung field has not changed essentially from the previous examination at the Saugus Hospital.

Mr. Mahony: You mean this is negative, the left lung field is negative?

The Witness: No, sir, I mean the previous changes which I described. In the left lung field the density which you saw just a moment ago has further decreased, and it is not quite as well defined, that is, its edges are again becoming a little bit fuzzy. Other than that there is nothing remarkable in the lung field.

Q. The next one. Wait a minute.

Cross Examination by Mr. Mahony

X-Q. When you say the density, you mean the X-rays are now penetrating more freely that area where you said they were not penetrating so freely before? A. No, sir, I interpret it as some resolution of the process which was demonstrated.

X-Q. By resolution you mean the disappearance of it or the absorption of it? A. Yes, sir.

X-Q. In other words, it is less. A. It is less.

X-Q. Than it was at the time of the other? A. Yes, sir.

[185] *Direct Examination by Mr. Prendergast, Resumed*

Q. Now the next one. A. This is a lateral view of the chest, Michael O'Brien, 71954, and the date, 3/7/53. Again we can see this what we call thin increased density and the apical segment of the right lower lobe. The right lower lobe extends, includes the whole lung beneath my pointer here. The right upper lobe includes everything above the pencil and the paper, and the right middle lobe is here. That is the apical portion of the right lower lobe.

Mr. Mahony: And the date is when?

The Witness: March 7, 1953.

Q. Next. A. Now these are laminagrams which were taken. A laminagram is a type of body sectional radiology, that is, we are able to slice through the patient by means

of the X-ray to bring out definite pathology at certain levels. Now on this examination we sliced the patient. We refer to it as slicing. Actually, it is a focusing device by which we can focus the X-ray beams at a level of 3 centimeters from the back. We see that the posterior portions, the back parts of the ribs stand out in good detail, so we know this is an X-ray posterior in the chest. The patient was lying on his back, and it was taken 3 centimeters from from the skin of the back which was against the X-ray table. On this we can see a well-defined shadow. Here is an area of whiteness we [186] can see. We call this a shadow. This is a shadow in the posterior part of the right lung field. Here it is right here (pointing).

Q. That is blotting out that rib. Is this a rib here? A. Yes, sir.

Q. Then you say this is to blot out part of the rib? A. That is imposed on the rib.

Q. All right. Now give us the rest of it. A. This represents that area of the increased density which I have shown to you in previous X-rays.

Now, another X-ray. This X ray was taken on March—

The Court: Do you want to inquire about that one?

Mr. Mahony: Yes, that one there.

The Court: Put that one back.

The Witness: Yes, sir.

Cross-Examination by Mr. Mahony

X-Q. The patient was lying on his—standing up? A. The patient was lying on his back.

X-Q. And the X-ray film under the patient? A. The X-ray film under the patient.

X-Q. And the X-ray tube over the patient? A. Over the patient.

X-Q. Going down through his chest? A. Yes.

X-Q. And that is supposed to emphasize what part of

the— [187] A. The part which contains the pathology.

X-Q. That you say was within how many inches? A. It is within 3 centimeters.

X-Q. 3 centimeters. And a centimeter is a little better than 1/3 of an inch? A. Yes, sir.

X-Q. So 3 centimeters would be something less than an inch? A. Roughly.

X-Q. And that is the area that you were showing in the other X-rays? A. Yes, sir. This is the triangular area here (pointing).

X-Q. And that is about what in dimensions? A. Well, I would say it was about, oh, an inch and a half by two inches.

X-Q. That is less than shown on the earlier X-rays? A. Yes, sir.

Direct Examination By Mr. Prendergast, Resumed

Q. Now the next one. A. The next one is an additional laminagram which was taken at 3-1/2 centimeters of the right lung here, and again we can see the area of increased density right here. Now on this film we can see the posterior ribs are—well, they are a little bit more apparent in here. Again, they are going out of focus here, we are getting out of the focus of the posterior ribs. Here is this area of pathology, and we can see it contacts a straight [188] line lying above it, and that is known as the long septum line between the lobes of the lung, that is, the upper lobe here and the lower lobe here. At this point we see the pathology in what is known as the apical segment of the right lower lobe.

Mr. Mahony: And that would be an area of an inch and a half?

The Witness: Yes.

Q. The next one. A. Now here is a section taken at 4 centimeters. These are all the same examinations on the

same date and the same number. Again we see an area of density. We can see within this area of density there is an area of blackness which represents a cavity within this process. Now cavities are found from either tumors of the lung, tuberculosis, or infarcts. They are not commonly found in infarcts; it is rather rare to get cavitation with infarcts. So that it was our opinion at the time this was taken that it represented a probable tumor with central cavitation.

Q. Now while ~~you have~~ mentioned it, at that time, have you since changed your opinion as to what that is? A. Now we know what it was.

Q. Now you know what it was? A. Yes.

Mr. Prendergast: Do you want to inquire?

Mr. Mahony: Yes.

[189] *Cross Examination by Mr. Mahony*

X-Q. Would you point out that area now, Doctor, you are referring to? A. Yes (pointing).

X-Q. That is on the same date? A. On the same date, yes.

X-Q. I understand you to say that it is an area of blackness that is showing up? A. The central portion: this area right here (pointing).

X-Q. That has increased density in that area? A. We call it—I am sorry. Decreased density.

X-Q. Decreased. A. Yes.

X-Q. That is, the X-rays penetrate more freely? A. Yes, sir.

X-Q. Now that, you said, might possibly be a tumor. Did you later rule that out? A. That was our pre-operative diagnosis.

X-Q. And you later ruled that out? A. We later ruled it out.

X-Q. And so far as tuberculosis is concerned; did you

make any tests with reference to that? A. Well, the X-ray Department—that is out of our field entirely. I don't believe we ever reported it as tuberculosis.

X-Q. What was it you said about infaret? It was extremely rare? [190] A. It is quite rare to get cavitation with an infaret.

Mr. Mahony: That is all.

Direct Examination by Mr. Prendergast, Resumed

Q. The next one, Doctor. A. The next one is at 4-1/2 inches and it shows the triangular area again, although this time we can see the area of blackness a little bit better, showing the area of cavitation in that one.

Q. How many more have you? A. Just a few more.

The Court: We'll go along.

Mr. Prendergast: Well, I don't want to keep the Jury.

The Court: They won't mind.

Q. You can come back tomorrow, can't you, Doctor? You may not want to, but you can, can't you? A. Yes.

Mr. Prendergast: Well, I think we will be better off if we stop.

The Court: Well, I don't want to hurry you. Can you come back tomorrow without too much trouble?

The Witness: I can come back the first thing tomorrow.

Mr. Prendergast: If you do, we can get rid of you quickly.

(Adjourned at 4 p.m., to 10 a.m. Thursday, December 1, 1955.)

[191] THIRD DAY

Court Room No. 5
Federal Building, Boston
Thursday, Dec. 1, 1955

DR. EDWARD N. BURKE, Resumed

Direct Examination by Mr. Prendergast, Continued

The Court: Doctor, will you take the stand?

Q. Doctor, will you continue on from where you left off yesterday afternoon? What have you before you now? A. This is an X-ray of a chest, a laminagram, with the name Michael O'Brien, 71954, and the date, 3 11 53. It is the last of a series of laminagrams, which I showed you yesterday, and here we can see that the posterior ribs have all but faded out, showing it's a section within the chest—we are going deeper into the chest. Here we can see the triangular area of density, which I described to you yesterday, showing the irregular cavitations within its central portion. Other than that, the lung field does not appear remarkable.

Mr. Mahony: I can't hear you.

The Witness: Other than that, other than the previously described area, the lung fields are perfectly clear. The left lateral chest is not included in the examination. The diaphragms are equal and regular.

Mr. Mahony: Is this the last X-ray?

The Witness: This is the last laminagram.

Mr. Mahony: All right.

[192] Q. All right. The next one, Doctor. A. This is a film, Michael O'Brien, 71954, and the date, 3 20 53. This is a post-operative X-ray, an X-ray taken immediately, a day or two after the operation. I don't know the date of the operation. But we can tell, because the left fifth rib has been removed. We can see the rib has been cut right

here, and then again anteriorly it has been cut. We can see several things. We can see there is a lot of so-called interstitial pneumothorax—that is, air in the soft tissues up in here (indicating), and down along the side of the chest, in this region (indicating). This is a common occurrence after operation, following an operation of this kind. We can see there is a little bit of fluid within the chest in this region. The heart does not appear remarkable. The heart appears larger on this film than on previous films, because this was a portable examination, which was done, using a different technique.

Mr. Prendergast: All right. Mr. Mahony?

Cross Examination by Mr. Mahony

X-Q. This, you say, was with a portable X-ray machine? A. I believe so, yes, sir.

X-Q. And would you point out what you were indicating? A. This is the interstitial pneumothorax, the air in the soft tissue, the blackness up here, down along the chest wall here. Here is the rib, which has been removed. There is a small amount of fluid we can see down in here, because of the increased density [193] in this angle, and a little fluid in this area (indicating).

X-Q. That is fluid in the pleural cavity? A. In the pleural cavity, yes.

Direct Examination by Mr. Prendergast, Resumed

Q. The next one, Doctor? A. This is a film of Michael O'Brien, No. 70874, and the date is 6/1/54. This film was taken approximately two and one-half months after the post-operative film you just saw.

Mr. Mahony: I didn't get that. Two and a half months after?

The Witness: Approximately, yes. This was taken on 3/20/53, and this one was taken—I'm sorry—

Mr. Mahony: 1954?.

The Witness: It was taken more than a year later. This is in June of 1954. And here we can see the lung fields are clear. There is still a little bit of pleural thickening here along the lateral chest wall. The right fifth rib has been removed. You can see there is a little bony regeneration occurring in this area. The portion of the bone which forms new bone is left behind during the operation. This is new bone which is formed from it. The lung fields are otherwise clear.

Mr. Prendergast: All right. Mr. Mahony?

Mr. Mahony: No questions.

Q. The next one. A. Michael O'Brien, 93833, 11/18/55. Here in this last film [194] which we have, we can see the left lung field is well aerated. It is clear, except for a little bit of pleural thickening on the left lateral chest wall. The right lung field is clear. And again we can see the rib which has been removed. There is a little bit of pleural thickening down at the right base.

The Court: A little bit of what?

The Witness: Pleural thickening.

Q. On the right lung now?

The Court: Tell us about that.

A. Pleural thickening means there is a scar, probably as a result of the operation, at the right base.

Q. So you have got two lungs now with two scars, is that right?

Mr. Mahony: Wait a minute.

A. Not in the lungs, but the pleura.

Q. The pleura? A. Yes, sir.

Mr. Mahony: That's clear, isn't it? Scars aren't on the lung or in the lung; they are in the pleura, which is between the lung and the chest wall?

The Witness: That's right, the covering of the lung and the chest wall itself.

Q. Anything else? A. That's all.

Q. Is that the last one? A. That's the last one. I have other films. Those are the [195] pertinent films. The others just show variations, such as post-operative disappearance of air in the soft tissues, and so forth.

Q. These other X-rays were taken after Doctor Soutter performed the operation? A. All of them.

Q. So they have nothing to do with the diagnosis—whether the operation should take place or not? A. No.

Mr. Prendergast: That's all. Thank you.

Cross Examination by Mr. Mahony

X-Q. Doctor, did you treat this man at all? A. In what way.

X-Q. I mean, did you treat him while he was at the Massachusetts Memorial Hospitals? A. Not directly with this case.

X-Q. Did you take the X-rays? A. I directed the taking of some of the X-rays.

X-Q. Did you make any of the X-ray reports in the hospital record? A. I believe there are some X-ray reports. Now whether any of those reports are mine, I can't say.

X-Q. Well, the hospital record would indicate whether they were reports made by you or by somebody else? A. The hospital reports would have the head of the department's name on them.

Mr. Mahony: That's all.

[196] *Redirect Examination by Mr. Prendergast*

Q. Doctor, here is the Massachusetts Memorial record. Will you go through it, if it doesn't take too much time, and tell us what were the reports?

The Court: It is agreed, isn't it, Mr. Mahony, and

gentlemen, that is the Massachusetts Memorial Hospital's record?

Mr. Mahony: There is no question about it. But I assume all the testimony with reference to this phase of the case is in accordance—

The Court: That is the Massachusetts Memorial Hospital's record and it may be admitted by agreement, is that right? I don't mean its contents. Don't misunderstand me.

Mr. Mahony: I don't question its authenticity. The relevance of it is covered by what we suggested at the Bench some days ago.

The Court: Yes.

Q. Any report you made there, Doctor, that is in the record, will you read it to the Jury? A. Which I made myself?

Q. That you yourself made or dictated. A. That's very hard to do because the original envelope which we keep at the hospital has the initial of the doctor who made the dictation.

Q. We haven't that here? A. No, sir.

[197] Mr. Prendergast: That's all, Doctor. I think you can step down, Doctor. Now Mr. O'Brien.

The Court: May the doctor go?

Mr. Prendergast: I think so.

Mr. Mahony: Certainly.

MICHAEL P. O'BRIEN, Resumed

Cross Examination by Mr. Mahony, Continued

X-Q. Mr. O'Brien, when you went to the Emerson Hospital after the accident, how long did you stay at the hospital? A. I don't know exactly. I left—

X-Q. When? A. —somewhere around 5.

X-Q. 5. The accident, you say, was between half-past one and two? A. Yes.

X-Q. I think you said they strapped some part of your body? A. Yes. They strapped my chest.

X-Q. Strapped your chest? A. Yes, sir.

X-Q. What did they strap it with? A. Tape of some kind.

X-Q. Adhesive tape? A. Yes.

X-Q. Did they apply any bandages or strap any other part of your body? A. No.

[198] X-Q. Are you sure of that? A. No.

X-Q. You are sure they strapped your chest? A. Yes.

X-Q. Did you hear Doctor Baskies say yesterday there was no strapping on your chest—that the strapping was below the knees on the leg? A. No. I don't remember.

X-Q. You don't remember him saying that? A. No.

Mr. Prendergast: Mr. Mahony, would you step back? Talk up loud, will you please? I am sure the people want to hear you.

X-Q. You say the strapping was on your chest, and it was adhesive, and that Doctor Baskies removed it? A. Someone removed it at the Saugus Hospital. I don't remember who.

The Court: What hospital?

The Witness: Saugus Hospital.

X-Q. Now to go back to the accident, you say that you saw this other car just before the collision, just before the contact, the Hobart car, is that right? A. Yes, I saw it coming, coming down the hill.

X-Q. What? A. I saw it coming down the hill, yes.

[199] X-Q. What? A. I saw it coming down the hill, yes.

X-Q. Didn't you tell the Jury, when you were on the stand before, that you saw it at the top of the hill? A. That's right.

X-Q. And didn't see it again until just before the contact? A. That's right.

X-Q. Then you didn't see it coming down the hill? A. I saw it when he started down the hill.

X-Q. At the top of the hill? A. Yes.

X-Q. When you say you saw him through the corner of your eye—which way were you looking at that time? A. I was looking straight ahead.

X-Q. Yes. And by the "corner of your eye", you mean to the left or right? A. I didn't turn my head to the left, if that is what you mean.

X-Q. That was just a fleeting glimpse? A. That's right.

X-Q. Now, you had started that trip from Shirley? A. Yes, sir.

X-Q. And did you go to Shirley that morning? A. Yes, sir.

X-Q. At what time did you start from Boston on this trip to Shirley? [200] A. I think it was 5 o'clock.

X-Q. In the morning? A. Yes, sir.

X-Q. What time did you get up that morning? A. About 4.

X-Q. Where did you pick up the truck? A. At Somerville.

X-Q. And then had it filled, did you? A. Yes, sir.

X-Q. And where was it filled? A. At Beacon Oil in Everett.

X-Q. You then drove to Shirley? A. Yes, sir.

X-Q. What time did you have breakfast that day? A. I don't remember exactly.

X-Q. Did you have it before you left the house? A. No.

X-Q. What time did you have lunch? A. Just before one.

X-Q. Where did you have lunch? A. In Shirley.

X-Q. Just before one? A. Yes.

X-Q. This happened, you think, about half-past one, between then and two o'clock? [201] A. Lunch?

X-Q. No. The accident. A. Oh, yes.

X-Q. Did you have a substantial lunch? A. No, I didn't.

X-Q. When did you quit work the day before?

Mr. Prendergast: I pray Your Honor's judgment. What has that to do with this case?

The Court: Well, it is cross examination, I don't know what Mr. Mahony has in mind. I will permit it.

X-Q. When did you quit work the day before? A. I don't remember. I think it was around 5 o'clock in the evening. I'm not sure.

X-Q. And what time did you go to bed the night before? A. I think I went to bed around 9 o'clock.

X-Q. 9 o'clock. And got up about, what, 3 in the morning? A. No, about 4.

X-Q. You don't want to change your statement that you were looking straight ahead and that you saw this other car just before the collision out of the corner of your eye? A. No.

X-Q. And you didn't see where the other car came in contact with your car, did you? A. Yes.

X-Q. Did it come in contact with some part that was in front of [202] you? A. In front of him.

X-Q. In front of you? A. Right alongside me.

X-Q. Right alongside of you? A. Yes, at the front wheel.

X-Q. Well, is the cab and the driver's seat right at the front wheel? A. Almost, just a little forward.

X-Q. How much in front of your driver's seat was the front wheel? A. Well, I don't know exactly, maybe a couple of feet.

X-Q. You told the Jury that you noticed particularly that the point of contact was on the rear of your left front wheel? A. That's right.

X-Q. What part of the other car was in contact with the rear of your left front wheel? A. The left front.

X-Q. Of the other car? A. Yes.

X-Q. The Utility Oil Company was operated by whom? A. John G. Donovan.

X-Q. That is John G. Donovan, doing business as Utility Oil? A. That's right.

Mr. Mahony: Is there any question, Mr. Daley, but what Donovan was doing business as the Utility Oil?

[203] Mr. Daley: None whatever. There never has been.

Mr. Mahony: And Mr. O'Brien was in the course of his employment?

Mr. Daley: There isn't any. I don't know what this has to do with the case.

X-Q. You said that your saw this Hobart car at the top of the hill? A. Yes.

X-Q. And it is agreed apparently that that is 732 feet, or thereabouts, from the Concord-Acton line? A. Well, I don't know exactly how far it is.

X-Q. So you were some distance west of the Concord-Acton line when you saw the car at the top of the hill, did you? A. That's correct.

X-Q. And how far west would you say you were off this boundary line? A. I don't know.

X-Q. Well, the accident happened about how many feet east of the town line, or the Concord side of the town line? A. Well, perhaps on the Concord side about 60 or 70 feet.

X-Q. 60 or 70 feet east of the town line is where the accident happened? A. That's right.

X-Q. So you traveled the distance from where you first saw the object or the car at the top of the hill to the point of the collision, the Hobart car traveled from the top of the hill to [204] the point of the collision? A. I don't understand that.

X-Q. All right.

(Messrs. Mahony, Daley, and Prendergast confer.)

Mr. Prendergast: Before it is read, do you want to state that you withdraw your exception to what was previously taken, Mr. Mahony, so the record will be straight? Do you want to step up to the bench?

(Conference at the Bench between Court and counsel, as follows:

Mr. Prendergast: We have agreed that Mr. Mahony put certain questions to the witness and they were answered by the witness.

The Court: Where?

Mr. Prendergast: It was in a court, but I don't think the Jury should be told it was in a court. I have no objection that he put these questions and that he answered in this way.

Mr. Mahony: Here is a statement he made under oath in another court.

The Court: At another time.

Mr. Mahony: I want it as under oath and in a court.

Mr. Prendergast: I object to it.

The Court: I will exclude it. He made it under [205] oath at another time.

Mr. Mahony: May my rights be saved on that?

The Court: Oh, yes. I do it for this reason: I'm keeping out of this case anything which would suggest to the Jury a prosecution in another court against this witness or anyone else. I would exclude it if Mr. Prendergast was offering it in connection with a prosecution against your man.

Mr. Mahony: My rights are saved. I resubmit my offer of proof that I made before. So there will be no misunderstanding, I have the stenographer here who took the testimony, and I propose when my case comes up to put her on the stand and ask her these very questions.

The Court: I won't exclude these questions being asked now. I want it understood in the record that I am not excluding the reading of the answers.

Mr. Prendergast: The questions and answers?

The Court: The questions and answers. It is being offered for the purpose of impeaching the witness' credibility?

Mr. Mahony: And his admissions.

The Court: And as admissions. The weight of this is for the Jury. I am going to permit the statement to be made by you, Mr. Mahony, that these answers were made—

[206] Mr. Prendergast: Questions and answers.

The Court: —questions and answers were made under the pains and penalties of perjury at another time.

Mr. Mahony: Without permitting me to show it was made in another court in an entirely different proceeding.

The Court: Without permitting you to show that which might well indicate that it was in a criminal court. Because this is the only time this case has been tried, isn't that right?

Mr. Prendergast: That is right, sir.

The Court: The first time it has been tried, the only time the civil case has been tried out. Obviously the Jury would get the impression that there was criminal prosecution, and it is agreed that any record of conviction is not admissible.

Mr. Prendergast: That's right.

The Court: So I am excluding it. Don't misunderstand me. I am going to let you read it.

Mr. Mahony: I'm not going to read it under those circumstances. I am going to put the stenographer on

and she will testify when and where he made the statement.

The Court: Well, I will permit her to say that [207] it was made.

Mr. Prendergast: In her presence—

The Court: —at a hearing. I don't deny you that right—that this witness made answers to questions, the force of which you have a right to argue to this Jury, that it may constitute either an admission or attack upon the credibility of the witness.

Mr. Mahony: But I understand your ruling is to the effect that I cannot tell the time or the place or the circumstances under which the statement was made.

The Court: You can't show the place, namely, the Concord Court, a criminal prosecution. Another reason I do it is because of the nature of the questions that were asked of this witness. Mr. Prendergast, I would like to have this record marked.

Mr. Prendergast: For identification?

The Court: Yes, marked for identification. Then I will have it marked and made a part of the record, so the questions propounded by the Judge will be available.

Mr. Prendergast: I think Mr. Mahony ought to read into the record the questions and answers he desires to put to the witness.

Mr. Mahony: I shall propose to do that until— [208] The Court: I want out of the case that there was a trial of the criminal case. If I submitted that, I would be under an obligation to permit full inquiry into that. It might well reach a situation where you would be justified in putting the Judge that presided in the trial on the witness stand.

Mr. Mahony: I am asking that these papers that I

have be marked for identification, particularly pages 22, 23, and 24, with reference to the questions and answers that are checked on the side with a check mark. Those are the questions and answers I am offering.

Mr. Prendergast: Can we have a photostatic copy of it?

The Court: Let me say this. I will order it all marked for identification, with particular reference to the questions asked by the Judge of the witness.

Mr. Daley: We are in agreement that the questions that the Judge asked are not to be inquired into here. We are in further agreement—

The Court: If this is going up, I want the questions to go up.

Mr. Mahony: Mr. Daley has a copy.

The Court: I'm not interfering with your right to show that at some other time this witness, and under [209] circumstances which constitute the taking of an oath, this man made answers which you claim serve as a basis upon which the Jury could have found, first, admissions against his own interest, secondly, that these questions and answers which you refer to are questions and answers which affect the credibility of the witness. I am perfectly willing to have you do that. The only thing I exclude is—I want to keep out of this case the suggestion of the Concord Court. Mr. Mahony, you agree that any record of conviction is not admissible. It's for the purpose of impeaching the witness' credibility. When I say this, I want this to have full application—I know nothing about these proceedings—I want this to have full application to any proceeding that may have been instituted against anybody else.

Mr. Mahony: I understand your Honor's ruling.

I am not permitted to state that on August 14, 1952, in the Concord District Court while under oath this witness was asked certain questions by the Court and the answers he gave thereto.

The Court: I am doing that because of the obvious inference from that, that he was there in a situation where that Court would have jurisdiction over only one matter, and that was a criminal prosecution, [210] and you all agree that its ultimate finding did not constitute a record of conviction that would be admissible.

Mr. Prendergast: We agree further that — Mr. Daley and Mr. Prendergast have agreed with Mr. Mahony as to what questions and answers in the said record marked for identification he may read.

The Court: All of which were made under the pains and penalties of perjury.

Mr. Mahony: You do not agree, I may say, that on August 14, 1952, in the Concord District Court this witness under oath answered certain questions put by the court.

Mr. Prendergast: I object.

Mr. Daley: We agree on that date he made the questions and answers under oath.

The Court: Under the pains and penalties of perjury?

Mr. Daley: That's right.

Mr. Mahony: Nothing further than that.

Mr. Prendergast: I will go further. I am perfectly willing he say that it was in Concord, but to leave out the words "District Court".

The Court: What do you say to that?

Mr. Mahony: No. I do say—I ask that my [211] rights be saved.

The Court: Under those circumstances the whole record will go up, all the questions and answers.

Mr. Buzzell: This might be an appropriate time to bring up—as to Donovan and his employment, and O'Brien—my understanding has been that whatever evidence is going in, in both cases, on the question of liability, is admitted in both cases.

Mr. Daley: That is so. But there are different rules of admissibility as against Donovan than there are against O'Brien.

Mr. Buzzell: I didn't want any misunderstanding.

Mr. Daley: We understand each other. All this evidence is going in.

Mr. Mahony: Can we agree, so there is no question about it, that Doctor Hobart, the defendant, was operating the car which was in collision with the truck, that O'Brien was operating the truck as agent within the scope of his employment of the Utility Oil Company, which in turn was operated by Mr. Donovan, the defendant?

Mr. Daley: Sure. No question of it.

(Discussion off the record.)

The Court: Counsel admit this is a transcript taken by a competent stenographer, and is a verbatim, [212] reliable copy of a statement made by this witness in the Concord District Court at a time when he was there as a defendant, and which proceedings ultimately ended in a disposition which does not constitute the kind of disposition which would make that record admissible in evidence. That is by agreement of counsel. That being so, why do you need it?

Mr. Mahony: If this might be added—that if Dorothy Probert were called to the stand and permitted to testify, she would testify that the questions and

answers in Exhibit A for Identification were put and answered.

Mr. Prendergast: That's right.

Mr. Daley: No question about it.

Mr. Buzzell: Another thing. This might be the appropriate time to bring it up. I understand that any exceptions taken by Brother Mahony apply to me in both cases, the plaintiff's case as well as the defendant's case?

The Court: That's right.

Now we have had a question on some testimony and we have agreed on it. This is to be marked for identification

The Clerk: A for Identification.

(Transcript of proceedings in the Concord District Court on August 14, 1952, marked Defendant's Exhibit A for Identification.)

[213] The Court: It is agreed that Exhibit A for Identification may be made part of the contents of the record.).

(End of Conference at the Bench.)

X-Q. Now, Mr. O'Brien, your business or occupation is that of a chauffeur? A. That's right.

X-Q. And you have been a chauffeur for how long a time? A. Since 1912.

X-Q. Did you have an automobile registered in your own name in 1952?

Mr. Prendergast: Well, answer that Yes or No.

A. Yes.

X-Q. Did you have an automobile registered in your name in 1953? A. Yes.

X-Q. And 1954? A. Yes.

X-Q. And 1955? A. Yes.

X-Q. You had a license to operate, of course? A. That's right.

X-Q. And you renewed that license in June, 1953, did you not? A. Yes, sir.

X-Q. And at that time you said nothing about anything which would interfere with your operation of an automobile, did you? [214] A. No, sir.

X-Q. And you have been driving the automobile in 1955? A. 1955.

X-Q. And driving in 1954 and 1953? A. Not altogether.

X-Q. You were driving it in 1953? A. Not altogether.

X-Q. You were driving it, were you not? A. At times.

X-Q. When did you begin driving it in 1953? A. Late in 1953. I don't remember exactly.

X-Q. When? A. I had a friend—

X-Q. I asked you when? A. I don't know exactly.

X-Q. You were certainly driving in November of 1953, at the time of this accident? A. That's right.

X-Q. How long before had you been driving? A. I'm not sure. Maybe a month or two. I don't know.

X-Q. You registered it the first of the year, didn't you? A. That's right.

X-Q. So that in 1953, whether in November or earlier, you were able to drive an automobile? A. Yes.

[215] X-Q. And in 1954 and 1955 you were able to drive an automobile? A. Yes, sir.

X-Q. Now, as a matter of fact, Mr. O'Brien, isn't it true that you did not see this Hobart automobile at any time before the collision? A. I didn't see it?

X-Q. Yes. A. I did see it.

X-Q. Of course this truck was registered, wasn't it? A. Certainly.

X-Q. And you made a statement, did you not, to somebody representing the company that insured that truck? A. That it was registered?

Mr. Prendergast: Are you demanding it?

Mr. Mahony: I am asking for it.

Mr. Prendergast: Do you demand it?

Mr. Mahony: I am asking Mr. Daley if he will produce a statement which this witness signed.

Mr. Prendergast: This is going to apply in my case. It has nothing to do with Mr. Daley.

Mr. Daley: I will produce it if you call for it.

Mr. Mahony: I am calling for it.

Mr. Daley: There it is (handing paper to Mr. Mahony).

X-Q. Is that your signature on the first page? A. It looks like it.

[216] X-Q. Do you say it is or is not? A. It could be—

Mr. Mahony: Is there any question but this is Mr. O'Brien's signature?

Mr. Prendergast: I know nothing about it.

A. I don't know.

X-Q. You don't know if it is your own signaure? A. No. It could be.

X-Q. The second page—Michael P. O'Brien? A. That could be, too.

X-Q. Well, do you say it is or isn't? A. Well, I don't know. What's it all about?

X-Q. I'm merely asking if this is your signature? A. It could be, yes.

The Court: Will you come up a minute?

(Conference at the bench between Court and counsel, as follows:

The Court: In connection with the reading of excerpts or certain parts of Exhibit A for Identification, I understand that you both object to the admissibility of it. Isn't that right?

Mr. Daley: Yes.

Mr. Prendergast: As to using the word "Concord Court".

The Court: That's right. That is the only objection?

[217] Mr. Prendergast: Yes.)

(End of conference at the Bench.)

X-Q. Let me ask you, Mr. O'Brien, if on June 26, 1952, on that date did you not say that: "I paid no attention to traffic proceeding in a westerly direction. All I know is that while going along my truck was hit. I don't know how or where it was hit." Did you say that on that day? A. Is this after the accident?

X-Q. June 26, 1952, five days after the accident. A. I don't know.

Mr. Mahony: May this be marked for identification?

The Court: Surely.

The Clerk: Defendant's Exhibit B for Identification.

Mr. Daley: That is Defendant Hobart's exhibit?

The Clerk: Defendant Hobart's Exhibit B for Identification.

The Court: The other is Defendant Hobart's exhibit?

Mr. Daley: That's right.

The Court: Yes.

Mr. Daley: I simply make that observation because there are cross-actions.

(Statement dated June 26, 1952, marked Defendant Hobart's Exhibit B for Identification.)

Mr. Mahony: Mr. Daley, will you come up, and Mr. Prendergast also?

(Conference at the Bench between Court and counsel as [218] follows:

Mr. Mahony: May it appear that the Employers' Liability Assurance Corporation was summonsed to produce its file with reference to this case, and particularly to produce any statements signed by Mr. O'Brien; that in pursuance of that summons the Exhibit B for Identification was delivered to Mr. Daley, and Mr. Daley produced it in pursuance at my request.

Mr. Daley: That may appear.

The Court: Didn't he produce it as a result of your demand?

Mr. Daley: Yes.

Mr. Mahony: Well, I've got to have him come up, the fellow that took it.

Mr. Prendergast: I may save you some time. If Mr. Daley says that this is a statement secured by an investigator for the insurance company covering the motor vehicle operated by Mr. O'Brien on the day in question, I will save you the necessity of bringing him up and admit now that that man's testimony would be that O'Brien signed it.

Mr. Mahony: And admitting that it is his signature?

Mr. Prendergast: And that is his signature, yes.

[219] The Court: All right.

Mr. Prendergast: I have no objection to your saying to the witness now, in order that you may further cross examine him on the statement, that Mr. Prendergast has made the admission.

Mr. Mahony: Admitted by counsel, Mr. Prendergast and Mr. Daley, that this is his signature and his statement. Right?

Mr. Prendergast: Right. No. I don't say that. I simply admit, Judge, this statement bears the signature of Mr. O'Brien, that the investigator produced by Mr. Mahony would testify that the signature on this document was put there by Mr. O'Brien in his presence. I am not admitting that this is O'Brien's statement.

Mr. Mahony: Only that this is O'Brien's signature?

Mr. Prendergast: That's right. I admit that.

(End of conference at the Bench.)

The Court: It is agreed that the signature on that paper, Exhibit B for Identification, is Mr. O'Brien's signature.

It is not conceded, as I understand it, the contents of it are not conceded by Mr. Prendergast; isn't that right, Mr. Prendergast?

Mr. Prendergast: That's right. I don't agree Mr. O'Brien made the statement, but I agree that is his [220] signature on it, without the necessity, Mr. Mahony, of you bringing anyone up to prove it.

Mr. Mahony: I offer the statement.

Mr. Daley: No objection.

Mr. Prendergast: None by me.

The Clerk: Defendant Hobart's Exhibit B.

The Court: So the statement goes in as an exhibit by agreement.

Mr. Prendergast: No. I simply have no objection. I don't agree to it.

The Court: You have no objection to it. Well, I won't exclude anything where there is no objection.

(Defendant Hobart's Exhibit B for Identification received in evidence.)

X-Q. Would you read this to yourself before I question you about it? (Pause.) That is the statement you made on that date, Mr. O'Brien? A. It could be.

X-Q. Do you have any question in your mind about it? That is the statement you made and signed? A. I don't remember it like that.

X-Q. Do you say you didn't make any of the statements on these two pages? A. I say I don't remember making it.

X-Q. Do you now say you didn't make any of the statements on these two pages? [221] A. No, I don't.

Mr. Mahony: (Reading:)

"Saugus, Mass.
June 26, 1952

"My name is Michael P. O'Brien, 69 years of age, a widower, and I live at 86 Kenmere Road, Medford,

Mass. I have been employed on and off for the Utility Oil Company, 151 Highland Avenue, Somerville, for about 17 years. On Saturday, June 21, 1952, between 1:40 and 1:50 p.m., I was an operating an asphalt distributor Mack tank truck on Route 2 in Acton. The weather was good. I was on my way home, and traveling east. I had been to Shirley, where I had distributed asphalt. I had been working in Shirley from about 7:30 until 1 p.m. As I remember, I was going along on my own right side of the road and about 20 to 25 miles per hour. Joseph Mullaney, Laurel Street, Somerville, my helper, was with me. Route 2, on the northerly side has a large open ditch with dirt piled outside the ditch for about 5 miles. This excavation has narrowed the road down to two lanes. Traffic in an easterly direction was heavy, and I recall traveling behind a small panel body truck with a couple of boxes that were bouncing around. I paid no attention to traffic proceeding in a westerly direction. All [222] I know is that while going along my truck was hit. I don't know how or where it was hit. I recall not too clearly that my truck ended up on the northerly side of Route 2, up against the fence. I recall that I had been thrown onto the—it looks like "rab"—"truck floor. I recall a policeman—"

Mr. Daley: "cab truck floor."

Mr. Prendergast: You're not having trouble reading it, are you?

Mr. Mahony: (reading):

"I recall a policeman prying open the truck door, and I was taken to the Emerson Hospital in Concord. I had a broken nose, fractured five ribs and injured both legs. Larry Gleason, my boss, came out to the Emerson Hospital and took me home to Medford. My

doctor, Doctor Baski of Medford, ordered me back into the hospital. On impact I was definitely knocked out.

"I have read two pages, and they are true.

Michael P. O'Brien."

X-Q. Mr. O'Brien, you said that your earnings or wages were about $99 per week?" A. That's right.

X-Q. I think you will have to take your hand away from your mouth. That was only a seasonal job, was it not? [223] A. That's right.

X-Q. And this job at which you get $99 a week was during what time of the year? A. About seven months.

X-Q. During what period? A. Summer months.

X-Q. Seven summer months? The summer months, about seven months in duration, you say you had this job? A. Sometimes into December, from May to December.

X-Q. At $99 a week? A. Yes.

X-Q. This statement just read was given to a representative of the insurance company that insured your employer's truck? That's correct, isn't it? A. As far as I know.

X-Q. Yes. Do you remember saying a little while ago, while you were on the stand before, that the contact took place between the Hobart car and your truck, you say at the rear of your left front wheel, that the truck immediately turned sharply to the left and you went across the road? A. Yes.

X-Q. You don't want to change that in any way? A. No.

X-Q. Well, do you remember any answers to interrogatories that I had over here from the Cambridge Court, Middlesex Superior Court, [224] that you said with reference to the Whitney car that it was the left front of your car and the forward left side of the Whitney car that came in contact? A. The Whitney car? I didn't say anything about the Whitney car.

X-Q. This is with reference to answers to interrogatories. A. I don't know anything about the Whitney car.

Mr. Prendergast: Wait a minute. May it please the Court, this man never saw the Whitney car in contact with his car. What these answers can be offered for on the Whitney case is only to contradict him.

The Court: Why isn't that so?

Mr. Mahony: That is what I am doing.

Mr. Prendergast: He hasn't said here anything to the contrary. He has told this Jury he never saw the contact with the Whitney car.

Mr. Mahony: In the answers to interrogatories under oath brought over from Cambridge, he said that he did.

Mr. Prendergast: What has that to do with this case? We are now suing you, not the Whitneys.

Mr. Mahony: It is impeachment of his credibility. Two different stories under oath.

Mr. Prendergast: They are not two different stories at all. He hasn't said in this case he saw the Whitney car before the accident.

[225] The Court: You can call the witness' attention to the question. That is usually the way to do it. Let him read the question and see if it refreshes his recollection.

Mr. Mahony: That's what we did the other day when we had Mr. Berger over here.

Mr. Prendergast: I am willing that he use your copy. I don't object to that.

X-Q. That is what you said in that case, wasn't it?

Mr. Prendergast: I pray Your Honor's judgment. It has nothing to do with this case.

The Court: You are offering it for the purpose of showing he made a statement at some other time in connection with a circumstance associated with—

Mr. Mahony: —with this accident, and made it under oath, and it is different from the testimony given here.

The Court: Is that he said he saw the Whitney car and in the other statement he said he didn't?

Mr. Mahony: In his testimony he didn't see the Whitney car and doesn't remember anything about the time of the collision; in the Cambridge case he said he saw it and saw it come over on his side of the road and where it hit his car.

The Court: Well, I think we will take a little recess.

(Recess.)

The Court: Now I think you had asked a question [226] when we took the recess. Would you read the last question?

Mr. Prendergast: Perhaps we can save a little time if Mr. Mahony will read the answer—any place in that document wherein this witness has said, "I saw the Whitney car which it hit me," or "was coming to hit me"—anything of that nature. I will then withdraw my objection, but until he shows that the witness said that before or in this set of answers, I object to the question being put.

The Court: I think the proper thing to do, and to safeguard the rights of all the parties, and I know Mr. Mahony won't object and I know you won't object,—I am ruling on something which I haven't yet read—would there be any objection to my looking at it?

Mr. Prendergast: No, sir.

Mr. Mahony: Not a bit. I have the originals—I had the originals when Mr. Berger was here.

Mr. Prendergast: I agreed you could use your copy or my copy.

The Court: Will you come up?

(Conference at the Bench between Court and counsel as follows:)

Mr. Mahony: Questions 5, 6, and 7, those were the ones read in here.

The Court: By the 'defendant', who does he mean?

Mr. Mahony: Whitney.

[227] Mr. Prendergast: That is in the Whitney case, which is the case Mr. Mahony has been using.

The Court: I will allow it.

Mr. Prendergast: Note my exception.

The Court: Oh, certainly.

Mr. Prendergast: Now I am going to ask you this: Will you allow me to read every question and answer on this paper, to show he has never said he saw the Whitney car in these answers?

The Court: Is this a statement you demanded?

Mr. Prendergast: No. These are answers to interrogatories in the Whitney case, which is not this case.

Mr. Mahony: I have no objection to his reading anything with reference to how the accident happened, but certainly with references to injuries and damages, I do.

The Court: The others deal with his hospital treatment?

Mr. Prendergast: What other ones?

The Court: All the other questions.

Mr. Prendergast: All the questions and answers that deal with liability.

The Court: That's all right.

Mr. Mahony: All right.

[228] The Court: I don't object to that.

Mr. Mahony: Oh, no.

(End of conference at the Bench.)

The Court: When evidence is offered, it is offered for various reasons. You offer evidence because it is a part of the whole picture. For example, statements made by witnesses—all that goes to you for the weight you care to attach to it. Answers to interrogatories, statements allegedly made by somebody else. When you examine those statements, you should examine all the circumstances surrounding them. For example, the circumstances under which it was obtained, the handwriting, who wrote it, was it read? Mr. Mahony on cross examination has a right to

ask questions, the purpose of which serve as a basis upon which he can predicate the claim—I am not saying it is so now and I am not saying it isn't so; either—the claim that the witness made a statement, another statement, or allegedly made another statement at another time. It isn't being offered, allowed in because of that, that that is true; it is allowed in as part of a picture and you, in the final analysis, are the weighers of the evidence. I will say more about that. You can sift and find out who is telling the truth.

Is that a fair statement?

Mr. Mahony: Yes, sir.

The Court: Counsel are satisfied with that?

Mr. Prendergast: Yes, sir.

[229] X-Q: These are the interrogatories I referred to when you were on the stand before in the case of O'Brien v. Whitney, Middlesex Superior Court. Question No. 5: Please state specifically and in detail the entire description of this accident, giving such detail related to said accident, stating in detail how it happened. That is with reference to the accident between the O'Brien car and the Whitney car. And the answer to No. 5: "I was proceeding on Route 2, Concord, in the general direction of Boston. The truck I was operating was about 25 feet to the rear of a vehicle ahead of me, traveling in the same direction, when my truck was suddenly struck. The defendant"—that is, Whitney—"coming from the opposite direction, came over onto my side of the road and his vehicle collided with the truck I was operating.

No. 6: "When did the operator of the plaintiff's automobile"—that is you—"first see the defendant?" That is Whitney. Answer to No. 6: "I first say the defendant"—that is Whitney—"when he came down the down-grade in my direction."

No. 7: "What part of the automobile owned or operated

by the plaintiff"—that is you—"collided with the defendant's car?" That is the Whitney car.

The answer: "The left front of your car and the forward left side." That is the Whitney car.

Now do you say you didn't see the Whitney car at any time from the time it was up at the top of the hill? [230] A. That's mixed up.

Mr. Prendergast: Now wait. You see this idea of inserting "top of the hill" is misquoting the testimony. Why doesn't Mr. Mahony correctly quote the testimony?

X-Q. Did you say here in this case, the first day you were on the stand, that you saw two cars at the top of the hill? A. That's right.

X-Q. The first of those two cars was the Hobart car? A. That's right.

Mr. Prendergast: Well, do you know?

Mr. Mahony: He says "That's right."

Mr. Prendergast: You're putting it into his mouth.

A. I think that's—

X-Q. Do you say now to the Jury that you didn't see that second car from the time it was at the top of the hill? You didn't see it at any time thereafter? A. That's right.

X-Q. Now you said when you were on the stand before, when I was questioning you, that when you saw this Hobart car out of the corner of your eye, that you didn't make any attempt to stop. That's correct, isn't it? A. Yes, I think it is.

X-Q. [illegible], is what you told the Jury? A. I think so.

X-Q. And, of course, made no change in the direction in which [231] your truck was traveling? A. That's right.

X-Q. Is that right? A. That's right.

Mr. Prendergast: You better keep your hand down, Mr. O'Brien, because you block your voice.

X-Q. Do you want to change that testimony in any way whatever? A. No.

X-Q. That you made no attempt to stop and didn't change the direction of your truck? A. No.

X-Q. You don't want to make any corr ction? A. No.

X-Q. These are interrogatories, Mr. O'Brien, filed in this case in this court, Defendant's Interrogatories to the Plaintiff.

No. 13: "If the brakes of the vehicle in which you were riding were applied just prior to the alleged accident, please state the distance in feet said vehicle was from the point of accident when said brakes were first applied."

Is that your signature? A. Yes, sir.

X-Q. Signed in the presence of Mr. Nitkin? A. That's right.

X-Q. Your answer to No. 13: "I applied my brakes but have no judgment as to distance in feet my vehicle was when I first [232] applied the brakes." A. That's right.

X-Q. Now you tell the Jury today that you didn't apply your brakes and didn't make any attempt to stop. A. I probably applied the brakes automatically.

X-Q. You have no memory whatever of applying the brakes? A. No.

X-Q. And you had no memory of applying the brakes when you answered this question that way, did you? A. That's right.

X-Q. All right. No. 14: "Please state the distance in feet the vehicle in which you were riding traveled after the accident to the point where it first came to a full stop."

Your answer: "About 25 feet."

That was your answer at that time, wasn't it? A. Yes.

Mr. Mahony: That is all, Mr. O'Brien.

Mr. Prendergast: Can we agree, Mr. Mahony, that the body or the contents of the statement, Exhibit 1, is not in Mr. O'Brien's handwriting?

Mr. Mahony: I would assume that to be true. I don't question it.

Mr. Prendergast: You don't question it. Well, I better get the testimony.

The Clerk: Exhibit B.?

[233] Mr. Prendergast: Exhibit B, yes.

Redirect Examination by Mr. Prendergast

Q. Is that your handwriting? A. No, sir.

Q. On either page, other than right here (indicating)? A. No, sir.

Q. Now, Mr. O'Brien, I forgot to ask you: Did you lose some weight between the time of the accident and the present time? A. Oh, yes.

Q. Tell the Court and Jury how much weight you lost. A. When I came out of the hospital, I weighed about 147.

Q. How much did you weigh when you went to the hospital? A. 190.

Q. How much do you weigh now? A. 180.

Q. Now there were some questions asked you about driving a car. There isn't any doubt you had a car registered in your name, and that you had a license? A. That's right.

Q. Tell the Court and Jury who drove the car in 1953. A. A friend of mine.

Q. Give his name. A. Warren Manning.

Q. Tell the Court and Jury where he is at the present time. A. He's in Waltham Sanatorium.

[234] Q. And what driving did he do for you? A. He done all the driving for me.

Q. Tell the Court and Jury what you mean. A. He just drove me from home to the station, over to his house, and back again, that's all.

Mr. Mahony: To the station?

Q. To the station? A. To the gas station. I used to go there every day.

Q. Now, tell me something. Did you work any place

other than—during the course of 1952—other than for the Utility Oil Company? A. Not in 1952.

Q. Well, when did this accident happen—'52?

Mr. Mahony: January 21, 1952.

Q. When did you go to work for the Utility Oil Company in 1952? A. Around the 1st of May.

Q. Did you work for anybody in April and March? A. No.

Q. I see. Well, when had you worked for somebody? A. That winter I worked for Mystic Motors.

Mr. Mahony: You mean the previous winter? Is that right?

Q. You don't call March winter, is that right? A. Well, that's right.

Q. The previous winter, meaning the winter of 1951 and 1952, [235] did you work for somebody? A. Mystic Motors.

Q. What did you do for them? A. Chauffeur.

Q. And when you say you were a chauffeur, what kind of vehicle did you drive? A. An oil truck.

Q. And where was the oil delivered you had in the truck? A. Sometimes to homes, business esfablishments.

Q. In other words, is this the picture—you drove an oil truck which delivered oil to homes and establishments to keep the heat on during the winter? A. That's right.

Q. And in the summertime you changed your job and went working for the Utility Oil Company? A. On asphalt.

Q. And that was your practice year in and year out? A. That's right.

Q. Was that because the oil delivery business—the season for it was over in the spring? A. It slacked off.

Q. It slacked off, so you took up another job doing this? A. Yes.

Q. Tell me another thing. Was there any time when you got time and a half? [236] A. Oh, yes. After 48 hours

Q. After 48 hours each week you get time and a half? A. Pretty near every week.

Q. I mean, if the work was there you would get time and a half, if you were to put the time in to get the extra money? A. Yes.

Q. You could earn time and a half if the business was there? A. Yes.

Q. And who had the preference regarding getting the time and a half pay? A. Well, the senior men.

Mr. Mahony: Objection.

Mr. Prendergast: When you hear an objection, don't talk.

Mr. Mahony: What he did and the amount of work he did, I have no objection to that.

Mr. Prendergast: This is of little consequence. It won't hurt you a bit.

The Court: If he knows.

Q. Was there some custom with the organization as a result of which some certain individuals would have preference as to the time and a half pay? A. Yes. The senior men.

Mr. Mahony: I object.

The Court: I will admit it.

[237] Q. What men would get it? A. The senior men.

Mr. Mahony: Again my objection.

The Court: Who?

Mr. Prendergast: The senior men, he said. That's all.

The Witness: The men on the top of the list.

Mr. Prendergast: Wait a minute.

The Court: I'm going to get into union organization. Isn't that right?

Mr. Prendergast: Well, we will leave the unions out.

The Court: It isn't anything like that?

Mr. Prendergast: No.

Mr. Mahony: The question of what this man did and the amount of work he did I don't object to.

The Court: Why isn't that true? If he worked overtime—and Mr. Mahony doesn't question his right to—he is entitled to time and a half. Is that true?

Mr. Mahony: Yes.

The Court: All right.

Q. When would the time and a half begin?

Mr. Mahony: First, did he work any overtime?

The Court: That's right.

Q. Did you work any overtime to get time and a half?

The Court: Fix the time now.

[238] Q. Well, first—

The Court: —in 1952, isn't that right?

Mr. Prendergast: All right, in 1952.

Q. Did you work and get overtime? A. Yes.

Q. On how many occasions? A. Almost every week.

Q. When was the time and a half usually? Did it usually come— A. After 48 hours.

Q. All right. And this accident happened on a Saturday? A. Yes.

Q. Can you tell the Jury what your memory now is as to whether you were on time and a half on the day this accident happened? A. I think I was. I am not sure.

Q. So the longer you worked, the more money you got? A. That's right.

Q. The slower you worked, the more money you got? Now, I forgot this; I ought to ask you this. What were your wages with the Mystic Motors? A. Approximately the same as with the—

Q. About $99? A. Sometimes more.

Q. And I suppose sometimes less? A. Yes, that's right.

Q. So there will be no mistake about this: How many cars did [239] you see on the opposite side of the road going in the opposite direction to you and which were some place

in the vicinity which were up on the hill some place? A. Two.

Q. All right. Did you at that time know whose car was in front and whose car was behind? A. No, I did not.

Q. Did you, as a matter of fact, know up until the moment of the accident whose car was in front and whose car was in the back? A. No, I did not.

Q. When you saw those two cars, in what position were they relative to each other? Were they beside each other or one in back of the other? A. One back of the other.

Q. All right. Will you be good enough to tell us whether or not they were at that minute at the top of the hill or on the way down the hill? A. On the way down the hill, naturally.

Q. Now about the brakes. Do I get the position—you're driving along, and you are watching the car in front, and you don't apply any brake, and all of a sudden you see this thing coming at you? A. Yes.

Q. That's what you mean when you say that you think you applied [240] the brakes naturally?

Mr. Mahony: Wait a minute. Objection.

Mr. Prendergast: All right. That's all.

Recross Examination by Mr. Mahony

X-Q. Mr. O'Brien, in the deposition taken in this case, February 28, 1953, at page 3, you said that you had been driving for 6 or 7 months for the Utility Oil, and then this question:

"What did you do during the other time?

"A. I used to drive oil trucks, but I haven't done that for the last few years."

Is that correct? A. That's correct.

X-Q. So that you hadn't driven any Mystic Oil truck for a few years prior to the taking of this deposition, is that right? A. Yes.

X-Q. Had you? A. That's right.

X-Q. This deposition was on February 28, 1953.

Mr. Mahony: Well, that's all.

Further Redirect Examination by Mr. Prendergast

Q. What is your memory, Mr. O'Brien, as to whether or not you did any work in the month of—Well, I will withdraw that for a minute. When you would go to work for the Utility Oil Company—do you follow what I mean? A. Yes.

[241] Q. —how late in the year would you usually work for them? A. Oh, sometimes into December.

Q. All right. Take the month of December of 1951 and the month of January, 1952, and let's say the month of February, 1952. Have you a memory as to whether or not you worked for anybody during those months?

Mr. Mahony: Objection.

The Court: I'll permit it.

A. No, I don't think I worked that year.

Q. That winter? A. That winter.

Q. Now the previous winter had you worked for anybody?

Mr. Mahony: Objection.

The Court: You mean 1951?

Mr. Prendergast: Yes, 1950 and 1951.

The Court: I will let him go back as far as 1951.

Mr. Mahony: He says 1951, more than a year before the accident, a year and a half before the accident.

The Court: I will permit it.

Mr. Mahony: My objection.

A. That means 1950 and 1951?

The Court: It means December of 1950 and January and February of 1951.

A. Yes, I think I worked that year.

Q. Who do you think you worked for? [242] A. I think I worked for Mystic.

Mr. Prendergast: All right. That's all.

Mr. Mahony: That's all.

Mr. Prendergast: Will you step down?

Mr. Mullaney.

Mr. Mahony: I have another question of Mr. O'Brien.

Further Recross Examination by Mr. Mahony

X-Q. Who did you say in 1953 was driving your car for you? A. Warren Manning.

X-Q. You say every day he drove you to the gas station? A. That is right.

X-Q. And what were you doing at the gas station? A. I used to sit around there with a friend of mine.

X-Q. And drive you back? A. Yes.

X-Q. So that the only use of the car in 1953 was to drive you over to a filling station where you hung around all day? A. That's right.

Mr. Prendergast: He didn't say "all day".

A. (Continuing) Oh, not all day.

Mr. Prendergast: You have to watch these fellows, Mr. O'Brien. They'll sneak in words you never were dreaming of.

X-Q. How long would you stay? A. Oh, 10 or 11 o'clock, maybe later, until around 4.

Mr. Mahony: Brother Prendergast says that wouldn't [243] be all day.

Mr. Prendergast: Not to me.

Mr. Mahony: Your day begins after four?

Mr. Prendergast: You're darn right, Brother, and I don't lose brief cases, either.

X-Q. Well, Mr. O'Brien, in 1954 and 1955 did you follow that same practice? A. No. I drove myself.

X-Q. In 1954 and 1955? A. That's right.

X-Q. And where would you drive to? A. Sometimes just over to the station, and back home again, or over to Warren's house, looking at television.

Mr. Mahony: That's all.

Mr. Prendergast: That's all. Thank you. Now, Mr. Mullaney.

JOSEPH MULLANEY, Sworn.

Direct Examination by Mr. Prendergast.

Q. You were sworn, were you? A. Yes, the other day.

Q. All right. Your name is what? A. Joseph Mullaney.

Q. Where do you live? A. 17 Laurel Terrace, Somerville.

The Court: Where is Laurel Terrace?

[244] The Witness: Somerville.

The Court: Whereabouts in Somerville?

The Witness: Right next to the Utility Oil.

Q. Where is Utility Oil? A. In between Davis Square. It's near Central Street.

Q. How old are you? A. 22.

Q. All right. In June of 1952, were you working for somebody? A. Utility Oil.

Q. And on June 24 of 1952, were you working for Utility Oil Company on one of their trucks? A. Yes.

Q. Who was the driver of the truck? A. Mike O'Brien.

Q. Talk up loud. Make believe you're a quarterback. Talk up loud. Where had you been that day? A. Shirley.

Q. And on the way back from Shirley was the truck you were on in an accident? A. That's right.

Q. Were you driving the truck? A. No.

Q. You were sitting on as a passenger, as it were? A. Yes.

[245] Q. And where were you sitting? A. On the passenger side.

Q. I know, but was it a two or a four seater? A. Two seats. I sit on the right.

Q. And who was driving? A. Mike O'Brien was.

Q. At some time you left Shirley, and you were on your way to where? A. Somerville.

Q. And was it a Saturday afternoon? A. That's right.

Q. At some time you got up to where you were in the vicinity of Concord and the Acton line, is that right? A. That's right.

Q. Did you see this accident happen? A. No.

Q. Were your eyes open at the time the accident happened? A. Partly.

Q. Where were you looking? A. Out the window.

Q. Which window? A. The right window.

Q. All right. Did you see any of these cars? Withdraw that. Did you see the cars or any cars coming in the opposite direction just before the accident happened? [246] A. No.

Q. You were still looking out the window? A. I didn't notice them. I didn't pay no particular attention.

Q. All right. You say at the time the accident happened you were looking out the right window? A. That's right.

Q. Did you see things out the right window as you were looking? A. Fields.

Q. What else? A. Guard rail.

Q. Did you see the guard rail? A. Yes.

Q. Tell the Court and Jury what you mean by that. A. That's the fence along the side of the road.

Q. Was there a cement post and then wires and then another cement post and then wires? A. Yes, cement posts.

Q. Can you tell the Court and Jury approximately how far that cement—those posts and guard rails were from the right side of the truck at or just before the accident happened? A. About 6 feet.

Q. Now then, you are looking out the window. Something happens. What is it?

Mr. Mahony: What he saw.

Mr. Prendergast: No. What he felt is just as good.

[247] A. There was a crash.

Q. Where was the crash? A. I went forward and, after it was over, I saw that the left front—

A. (Continuing) I really don't know where I went forward.

Q. Well, you went forward with the movement of the vehicle. And you felt something? A. I felt Mike land in my lap.

Mr. Mahony: What?

Mr. Prendergast: Mike laying in his lap.

Mr. Daley: That isn't you.

Q. What was the movement of the vehicle? Did it go straight ahead, turn left, or what? A. It swerved to the left.

Q. That's all I wanted to get. Now, as it swerved to the left, did something happen to Mike? A. Yes. He kept falling on the floor.

Q. He fell on your lap and then on the floor? A. He fell across me. He kept falling on the floor. I kept pulling him up.

Q. All right. Did he fall to the floor? A. I don't think he ever hit the bottom.

Q. All right. Give us the picture. A. No, he didn't.

[248] Q. He didn't fall as far as the floor? A. No.

Q. Well, he was on your lap all the time or forward of your lap? A. His shoulder—I had him right by the chest there, right around there, and kept trying to pull him up. I was way over on the right, and he was stretched all the way across.

Q. Are there gears in the middle there? A. Yes, it's a floor shift.

Q. A floor shift? A. A floor shift.

Q. Do you know how many gears are between the driver and the passenger? A. Yes, they come up from the floor.

Q. Like the old shifts they used to have? A. That's right. Two of them.

Q. Now at some time the accident was all over, is that correct? A. When the accident was over?

Q. It was over at some time. You got out of the truck? A. Yes.

Q. What door did you get out? A. My door.

Q. You mean the right door? A. The right door.

Q. At the time you got out of the truck, where was it? [249] A. Up against the fence.

Q. Up against which fence? A. Against the guard rail on the opposite side.

Q. On the opposite side. So that the truck was heading then in a northerly direction, is that right? A. Yes.

Q. If you don't understand the compass, it's all right. At any rate, the truck you were in was up against the fence. It was on the left hand side of the street, as you had been going along, is that correct? A. Yes, that's right, where it finished.

Q. After there was the first contact, was there another contact besides the contact of the vehicle with the fence? Was the truck, in other words, hit by another car, if you know? A. I don't know.

Q. You don't know? A. I don't know whether it came before or after.

Q. Before or after what? A. After we hit the fence.

Q. All right. Were there three contacts of your motor vehicle with something that day? A. Was there what?

Q. Three contacts of your motor vehicle with something else? A. Yes. They come before we hit the fence, I think.

Q. At any rate, when you got out of the truck, you got out the [250] right hand side? A. Yes.

Q. Was there a vehicle right there on the right hand side of the truck? A. Yes.

Q. And did you later find out that was the Whitney car? A. That's right.

Q. What? A. That's right.

Q. After you got out of the truck, or before you got out of the truck, did you place Mr. O'Brien some place? A. Yes, I put him on the seat.

Q. How did you put him, sitting up, laying down, or what? A. Laying down. He was moaning.

Q. What did you do after you got out of the car, out of the truck? You did something. What did you do? A. I looked at the Whitney car.

Q. What did you do next? A. I looked in the other car. I walked around and tried to open the door.

Q. What door? A. Of the truck.

Q. What door of the truck? A. His door, his side.

Q. You mean the left hand side, the left hand door of the [251] truck? A. Yes.

Q. All right. When you tried to open the left hand door of the truck, were you able to open it? A. No, I wasn't.

Q. All right. Did somebody come along and try to open the door with you? A. Yes.

Q. Who was it, if you know? A. I don't know.

Q. Well, describe the kind of fellow he was, if it was a man. A. He was a big guy.

Q. A big fellow. Tell us, did he succeed in opening the door? A. Yes.

Q. Before he succeeded in opening the door, did something happen? A. I think he broke the handle off.

Q. Did he have difficulty in finally opening the door?

Mr. Mahony: I object.

Q. Did you see him having difficulty opening the door?

Mr. Mahony: Objection.

The Court: That is for the Jury. He can describe what he did.

Q. Describe what you saw the man doing, how long it took him to do it. [252] A. We were both pulling on it.

Q. And finally the door opened with the handle broken? A. Yes.

Q. Was Mike then taken out of it? A. I don't know whether they did then or not. I think they did, and took him to the hospital.

Mr. Prendergast: Your witness.

Cross Examination by Mr. Mahony.

X-Q. Mr. Mullaney, what time did you leave Shirley? A. I don't know. I know we ate at the diner just before we left.

X-Q. How far was it from Shirley to the Acton Concord line? A. I have no idea.

X-Q. You can't tell us in miles at all? A. I couldn't come close.

Mr. Prendergast: Talk up loud.

The Court: You couldn't what?

The Witness: I couldn't come close.

X-Q. When do you say this accident happened, what time of the day? A. About 1:30.

X-Q. You have said in the past it was around 4 or 4:30, have you not? A. Who?

X-Q. You. [253] A. Not that I remember.

X-Q. You don't think so? A. I don't think so.

X-Q. All right. You were sitting on the right side of the front seat? A. The right side.

X-Q. How were you sitting? A. I was slouched down, one foot against the fire wall, and one knee up against the dash board.

X-Q. That is, you had one knee up against the dash

board and were slouched back into the seat? A. That's right.

X-Q. So that you did not see anything prior to the accident, did you, just prior to the accident? A. I didn't see no cars prior to the accident.

X-Q. You didn't see anything out to the right, did you? A. I saw the fields.

X-Q. What? A. I saw the fields.

X-Q. Slouched down? Was the window below the level of your eyes or above the level of your eyes? A. The window is—I could see out the window.

X-Q. You could see up into the air? A. I could see down.

X-Q. You don't know in what lane the truck was traveling, do you? [254] A. I figured the right.

X-Q. You don't know, do you? A. I'm not positive.

X-Q. Is that a fair representation of the Hobart car as you saw it in the road there after the accident (handing photograph to the witness)? A. Yes.

Mr. Mahony: I am going to offer it.

Mr. Prendergast: Let's see it.

(Mr. Mahony hands photograph to Mr. Prendergast.)

Mr. Prendergast: All right. Let the Judge see it. Is this at the scene of the accident—this car?

Mr. Mahony: That's what he says

Mr. Prendergast: This was taken at the scene of the accident before it was moved?

Mr. Daley: No objection.

The Clerk: Defendant Hobart's Exhibit C.

(Photograph marked Defendant Hobart's Exhibit C.)

Mr. Mahony: (To the Jury.) Mr. Foreman, ladies and gentlemen of the Jury. This is Exhibit C, which the witness says is a fair representation of the Hobart car at the scene, and after the collision (handing photograph to the Foreman of the Jury)

X-Q. Now, Mr. Mullaney, I understand that with the contact with the first car, the Hobart car, that Mr. O'Brien was in your lap?

[255] Mr. Friend: At the contact?

Mr. Mahony: Right after the contact.

X-Q. Is that right? A. That's right.

X-Q. And you were on the extreme right of the cab? A. That's right.

X-Q. And you had his shoulders and chest that you were holding onto? A. I had him around the chest.

X-Q. And under his arms? A. I think so. I know I had him around the chest.

X-Q. Is it your memory you had hold of him around the chest and your arms under his arms or not? A. I don't recall—I kept pulling him back up.

X-Q. Now that was the position in which he was when the truck went across the road and into the fence? A. What's that again?

X-Q. That was the position in which Mr. O'Brien was as the truck went across the road and into the fence? A. That's right.

X-Q. And I think you said that at no time did he fall to the floor? A. I don't think he ever hit the floor.

X-Q. All right. About how wide is the seat of that truck? A. Both seats?

[256] X-Q. Yes. A. From one door to the other?

X-Q. Yes. A. About 5½ feet.

X-Q. You saw this gear shift—was that a single lever? A. No, about 5 feet.

X-Q. This gear shift you're speaking of—I think you described it as a floor shift? A. That's right.

X-Q. And by that do you mean it comes up through the floor of the car? A. That's right.

X-Q. And is it to the right of the driver's position as he

sits behind the wheel, or to the left? A. It is to the right. There are two of them.

X-Q. And what were the two? A. One is on under-drive; the other is standard.

X-Q. And what was their position prior to the accident? A. What gear were they in?

X-Q. The gear levers, yes. A. I have no idea. If he were going 25 or 30 they must have been about fourth or maybe fifth gear.

X-Q. All right. And if it was going 30 miles an hour, you would say it was in fourth speed?

Mr. Prendergast: Wait a minute. He says it depends [257] on the driver.

A. (Continuing) Some leave it in fifth and let it labor. I saw him leave it in fifth at 15 miles an hour.

X-Q. At the particular time of the accident, did you notice the position of the levers? A. No.

X-Q. As the person sits in the driver's seat with the wheel in front of him, are they within reach of his hand? A. Yes. You don't reach down. It's like over here (indicating).

X-Q. You mean you don't have to reach down? A. You don't have to reach down. You reach over. You reach down, but it's not way down.

X-Q. Is the top of the gear shift lever at the level of the seat? A. It is above the level of the seat. There are two different sizes. One is about at the same level of the seat, and the other is about 6 inches higher.

X-Q. Up until the time of the accident, at the time of the accident when the truck swung or swerved to the left, up until after the truck went into the fence, you were still holding Mr. O'Brien by the arms or chest? A. That's right.

X-Q. On your left? A. That's right.

[258] Mr. Mahony: That's all.

Redirect Examination by Mr. Prendergast.

Q. What did you mean when you said you kept pulling him up? A. He kept falling down.

Q. Falling down where? A. In between the seat and the dash board.

Q. Between the seat and dash board. That is, as he was falling down you would pull him back up?

Mr. Mahony: Wait a minute, please. Let him tell us.

Q. Go ahead. A. As he was falling down, I was pulling him back up.

Mr. Prendergast: That's all.

Recross Examination by Mr. Mahony.

X-Q. Do you still say that at no time did he fall to the floor? A. I don't think he actually hit the floor, no. His knees might have been on the floor. I know his chest didn't, or his shoulders.

Mr. Mahony: That's all.

Mr. Prendergast: That's all. Rather than get in the middle of a hospital record, may I suggest we have lunch?

The Court: I would like to go along until about 1 o'clock. Then I should like to recess until quarter past 2.

Mr. Prendergast: Well, then, the Saugus Hospital.

[259] GRACE R. FRASER, Sworn.

Direct Examination by Mr. Prendergast.

Q. Your name is what? A. Grace R. Fraser.

Q. You live where? A. 39 Center Street, West Lynn.

Q. You work for the Saugus Hospital? A. Yes, I do.

Q. You have been summonised in here with records relating to Michael O'Brien? A. Yes.

Q. What is the first record you have got? A. The first one is in June.

Q. What year? A. June 21, 1902.

Q. Fine. Will you read that, but leave out everything that deals with liability? A. Well, what would you like to have read?

Q. Start at the beginning. A. Well, in order?

Q. Yes. A. The Progress Notes, the doctor's orders, the clinical sheet, I can't read. It shows the temperature.

Q. Up and down? A. Yes.

[260] Q. Well, let that go. What about the Admission Sheet? Have you that? A. Yes.

Q. Let's get that. A. He was admitted June 21, 1952, at 9:30 p.m. The Chart No. is 4769. He is a widower. His name is Michael P. O'Brien. Sex: Male. Address: 86 Kenmere Road, Medford, Mass. Do you want the telephone number?

Q. Not of Michael O'Brien, I don't. A. (Continuing) His Age: 69-½ years; Date of Birth: December, 1883; Birthplace: Ireland; Religion: Catholic; Patient's Occupation: Truck driver; Employer: Utility Oil Company, 151 Highland Avenue, Somerville; Nearest Relative: Son—William, whose address is 5 Courtland Street, Everett. Have you ever been treated at this hospital? No. Have you been treated at any other hospital within past year? No. Admitting physician: Dr. Baskies. The purpose was: Medical Treatment. How long has condition existed? Today. Blue Cross Member? No. Are you a Blue Shield Member? No. Person responsible for bill: Michael O'Brien. Employer: Utility Oil Company. It's signed by an R.N., who admitted him.

Q. All right. Now do you have anything that shows the history received? A. Yes, upon his admission, yes.

[261] Q. All right. Let's have it. A. It is written by the doctor, his personal history. The Final Diagnosis: Multiple injuries, pleurisy with effusion in left chest, fracture of the fifth, sixth, seventh, and eighth ribs on the left side.

Q. It says "Truck Driver" here (indicating). A. Occupation: Truck Driver.

Q. Read the rest. A. His chief complaint: Auto accident 6/21/52. Pain in left chest, reoccurring headache, pain in nose. I don't know what this is.

Q. "Cannot breathe through nose"? A. Yes. "Pain in right arm and forearm and in elbow joint. Pain in left elbow, cut bleeding, cut on left hand, oozing serum and hand swollen. Pain in left leg and abrasion about 4 inches below knee.

Q. "L" shaped? A. (Continuing)—"abrasion about 4 inches T-shaped below knee, down right knee, swollen and abrasion below knee anteriorly, oozing serum. Makes a noise on breathing in chest. Patient's history: History of unconsciousness, of unknown duration, after being hit in auto accident. Taken to Emerson Hospital."

Q. Now maybe we can save a little time. Do you remember hearing Doctor Baskies' testimony? A. Yes.

[262] Q. Did he read this complete sheet? A. Yes.

Mr. Prendergast: Do you want it, Mr. Mahony?

Mr. Mahony: Is that the Personal History?

Mr. Prendergast: The first one is dated 6/21/52, Personal History, yes. If you want it read, I will have it read.

The Witness: He read that.

Q. What is the next sheet, his Examination? Do you have that? A. That is right there. The Examination. Then you go through all the X-ray reports. He read them, I believe.

Q. Leave those out. A. He read the Consultation of Doctor Cotta and Doctor Farrand.

Q. Wait a minute, now. Where is the consultation? A. This is Doctor Cotta's consultation, and he read Doctor Farrand's also.

The Court: Did he read those?

Q. You better read Doctor Cotta's report.

The Court: Do you mind if I offer a suggestion?

Mr. Prendergast: Not a bit.

The Court: You go over the rest of this. You may have a chance to talk to Mr. Mahony for a few minutes. Do you object to any part of it being read, Mr. Mahony?

Mr. Mahony: What?

The Court: Do you object to some parts of this?

[263] Mr. Mahony: Nothing he has taken up so far.

The Court: That's right. If you could have about 5 minutes, you could probably get together on what are the objectionable features. It's customary to have them read rather than the record go to the jury room, because it's a safer way to do it. Sometimes there are matters in the hospital record that are not admissible. Lawyers know what are and are not admissible matters. I would suggest you take a few minutes to look that over, and we will recess and come back at quarter past two.

(Recess.)

[264] Afternoon Session

Mr. Prendergast: I'm going to interrupt with the hospital record and I would like to put on Dr. Soutter.

The Court: All right. I would like to say to Mr. Buzzell and Mr. Mahony—I want you to know I extend the same privilege to you. You put your doctors on in any order you see fit, even while the plaintiff's case is going in. That will be perfectly all right.

Lamar Soutter, Sworn

Direct Examination by Mr. Prendergast

Q. Your name is what, sir? A. Lamar Soutter.

Q. You live where, Docto.? A. In Dedha....

Q. Your profession is what? A. Surgeon.

Q. Specializing in anything? A. Chest surgery.

Q. And you are a graduate of what school? A. Harvard.

Q. When? A. 1935.

Q. And then what is your medical school? Is it Harvard Medical? A. Harvard Medical School.

[265] Q. Did you have pre-medical training? A. Yes, at Harvard College.

Q. You're Harvard College and Harvard Medical School then. All right. What has been your experience since you graduated from Medical School? A. I went through five and a half years' medical training in New York and Boston, and then since that time I have been doing chest surgery and general surgery, mostly chest surgery.

Q. You have been connected with what hospitals in the meantime? A. I am on the staff of the Massachusetts Memorial Hospitals, the Boston City, the New England Deaconess, Massachusetts General, Boston Veterans, the Providence Veterans, the Waltham Hospital, the Salem Hospital, the Lemuel Shattuck, and a few others.

Q. At some time, Doctor, in 1953, did a Michael O'Brien come under your care? A. Yes, he did.

Q. Was that when he went out to the Massachusetts Memorial Hospital? A. That's correct.

Q. Did you at some time get a history as to what was the matter with him? A. Yes, I obtained the history, his illness, at the time he entered the hospital.

Q. You may refer to the hospital record if you wish. [266] A. It is all in the record here. Very briefly, that he had an accident in the preceding June, that he had then been treated in other hospitals for fractured ribs and fluid in his chest cavity, which followed the fractured ribs, that he had had a hernia, which he stated had been caused by the accident, that the hernia had been repaired, that a second hernia occurred at that time or was discovered at that time and it also was repaired, that he had during his

convalescence from his two hernia operations, he had coughed up some blood. Subsequently a shadow was seen in the film of his chest, and was seen on the right side, and because of that shadow a doctor had referred him to us as the question had been raised as to what the shadow was. He was sent to us for appropriate diagnosis and treatment.

Q. Was a diagnosis ultimately made? A. Yes.

The Court: What do you mean by "sent to us"?

The Witness: To the Chest Service at the Massachusetts Memorial Hospitals.

Q. You say a diagnosis was made later? A. Yes. It was made by removal of a portion of the lung and submitting it to a pathologist for study.

Q. Now what I'm trying to do is get the picture of what occurred after you got this particular history. Will you acquaint the jury, the Court and jury with that? In other [267] words, a general synopsis, more particularly of what is in the hospital record. A. All right. When we first saw the patient we were at a loss as to what the trouble was. An abnormal shadow on the lung is impossible to identify without farther study. And his shadow in our minds could have been one of a number of things. It could have been a cancer of the lung. It could have been a blood clot in the lung. It could have been due to tuberculosis or to some other type of infection. And it was up to us to find out the diagnosis and to treat him accordingly. When we first saw his X-rays cancer of the lung was most prominent in our mind. He was at an appropriate age for cancer of the lung. The X-ray studies were more suggestive of it to us than any other single disease, although we were unable to eliminate the other possibilities. We put him through a number of studies, which are quite routine for such an individual. We looked in the material which he coughed up, the phlegm he coughed up, for cancer cells.

and we studied it for the type of bacteria which grow in it, and we studied it particularly for tubercle bacilli to see if he had tuberculosis.

The phlegm he coughed up contained no cancer cells. It contained no bacteria which were harmful, and no tubercle bacteria. That did not eliminate the possibility of cancer, because in a certain number of cases, about 40 per cent of individuals who have cancer of the lung, the cells will not [268] appear in the phlegm. So then we conducted a procedure, which we called bronchoscopy, in which we put a hollow tube under anesthesia down in by the windpipe, and you examine the inside of the bronchial tubes. You look specifically for the presence of a cancer growing in one of those tubes. We couldn't see one. We removed more secretions for further study to see if we could find cancer cells, and we couldn't find them.

After considerable discussion we were forced to make a discussion in one direction or another. The shadow had not resolved itself.

Q. What do you mean by "resolved"? A. It had not disappeared.

Q. All right. A. In most people who have a simple infection treated by penicillin or similar drugs—

The Court: By what?

The Witness: Penicillin or similar drugs.

A. [Continuing] —or who have a blood clot to the lung, the shadow will gradually disappear in the course of days and weeks. It certainly will diminish in size, which encourages you to believe that the process is regressing in a satisfactory manner.

With a cancer, however, the shadow is apt to persist and to grow, because it is a form of growth. His shadow had [269] disappeared. And under those circumstances we were faced with two alternatives. One was to observe him further. If this were a cancer we were observing it might

in the course of that period of observation spread elsewhere in his body and ultimately cause his death. If it were not a cancer we would be performing an operation which probably was unnecessary from the point of view of curing him.

Well, this is not an infrequent decision doctors have to make. We decided we could not afford to observe him any further. If it were a cancer we had tested the golden period of time in which a cure might be effected, in that the chances of getting into any difficulty with the operation in the way of death or anything of that sort were minimal.

There was very little risk to him, and therefore we felt we should perform the operation, and we did. We went into his chest on the 19th of March, if I remember correctly, and we opened it up, and on the right side your lung is divided into three sections that we call lobes. The area involved was in the lower lobe of the lung.

There are two methods of handling it, when you get into the chest cavity. One is to take a knife and cut into it, give the tissue to the pathologist and have him identify it. If you cut into a cancer of the lung, in that manner you will spread cancer cells in the chest cavity, and then even though you perform an operation and remove the primary tumor that grew in [270] the lung, because you have spread the cancer cells the patient may ultimately succumb to the disease. You have no alternative but to remove the whole lobe, which gets around the cancer completely, and avoids the chance of spreading.

When I felt this lump in there I couldn't identify it. It had some of the characteristics of cancer and therefore we performed what we believe to be the safest operation for Mr. O'Brien, and we removed the lobe of the lung and gave it to the pathologist.

Q. All right. What did the pathologist say? A. The pathologist said—

Mr. Mahony: Is this in the hospital report?

Mr. Prendergast: Yes.

The Witness: May I read it?

Mr. Mahony: I was just asking if it was.

Q. Is it? A. It is in the hospital report, yes.

Q. Summarize it for us. A. He said the lung contained a blood clot, which had been there for from four to six weeks in time.

Q. Now is that blood clot what you call an infarct? A. Yes.

Q. What was done after that? What did you do—sew him up? A. We closed him up, and again we had considerable discussion. If he had one blood clot of the lung and the source from which [271] the blood clot had come was still present, couldn't he have another one and this time perhaps a larger and more fatal one? I don't know whether I shall go on or not.

Mr. Mahony: Wait a minute.

Q. All right. What did you decide? A. We decided to tie the veins in the legs, and that was done two days after the first operation.

Q. And the purpose of tying the veins in the legs was for what reason? A. To forestall the possibility of a fatal blood clot going to his lung.

Q. All right. Now, Doctor, assume this man had been in an automobile accident on June 21, 1952, and that prior thereto there was nothing the matter with him physically, and that as a result of the accident he was taken to the Saugus Hospital after having been at the Emerson Hospital for a matter of three or four hours, and that he received five, I think, fractured ribs, that he received these hernias that you have mentioned, that in addition thereto he received some bruises or lacerations, and I think the testimony is lacerations in the area of both knees, and that X rays taken at the Saugus Hospital in the early part of his stay there indicated that there was no density of any

kind in the right lung before the operation for the hernia, and that after the operation for the hernia X rays then disclosed the fact that there was a [272] density in the right lung, and that thereafter he was then sent to you or went to the Massachusetts Memorial Hospitals where the observations were made that you have just described and the operations performed that you have just described and where the things found were what you have described, have you an opinion, Doctor, as to whether or not that automobile accident that I have described was an adequate cause of the infarct that you finally found? A. Yes, in my opinion it would be.

Q. All right. Will you tell us on what your base your opinion? A. That after an accident, particularly in which there are injuries to the legs, blood clots occur that go to the lung, and that this sequence of events is quite consistent with that.

Q. With that having happened? A. Yes.

The Court: Doctor, don't they call that tying off the veins in the legs vein litigation?

The Witness: Yes, your Honor.

The Court: That is one way of stopping the flow of blood through the veins that would strike the heart or one of the vital organs?

The Witness: Theoretically the big clots form in the long veins of the leg, and if you can interrupt the direct pathway between the leg and the heart, then only a small clot [273] from up above there could break off, and a fatal long clot is less apt to occur.

The Court: That is what they call a coronary occlusion?

The Witness: No, sir, it is called an infarct.

Q. Now, Doctor, what if anything had the hernias to do with it, the operation for the hernias? A. Well, after operations people are lying in bed and are a little bit more inactive than usual, and they quite frequently will have

blood clots go to their lung. Quite frequently—that's a fair statement. But they will in a small percentage of cases have blood clots go to their lung.

The Court: When you tie off these, in a vein ligation, does nature ever relieve the pressure?

The Witness: There are other tributaries, small tributaries that take back the load of blood.

Q. Doctor, you said something about four or five weeks or something. Assume that the density appears within four or five or six weeks after the operations for the hernias, have an opinion as to—on that set of facts have you an opinion as to what caused the infarct?

Mr. Mahony: Objection.

The Court: I will permit it.

A. A density appearing at the time of operation with a history of coughing up of Blood, and so forth, I would naturally think [274] of an infarct first. The infarct could occur at any time after the operation but usually occurs fairly shortly thereafter if it is going to, particularly in somebody who has injured legs, and so forth.

Q. Now then if the first operation for the hernia was on January 12, 1953 and the second operation was on February 4, 1953—

Mr. Mahony: Are you sure of that?

Mr. Prendergast: Well, I thought I was.

[Counsel confer.]

Q. Well, can you tell us from your records when it was the density first appeared in the X-rays? A. I believe it was the 13th of—no, some time in the middle of February. I would have to find the X-ray report to tell you that exactly. There is no point in my trusting to memory on that.

Q. These are the X-ray reports, I think. Those are the Saufgus reports. A. February 14.

Q. All right. February 14. Now, Doctor, assume that the first operation for the hernia was, according to the

hospital record, January 12, 1953, and that the density was first discovered according to the X-ray report on February 13th or thereabouts— A. The 14th.

[275] Q. [Continuing] Have you an opinion as to what was the adequate producing cause of this infarct?

Mr. Mahony: Objection.

The Court: Admitted.

Q. That is, whether it was the leg condition or the hernia condition?

Mr. Mahony: Objection.

A. May I answer?

The Court: Yes, you may.

A. [Continuing] I would say it probably resulted from the hernia operation.

Q. Now will you be good enough to tell the Court and jury what the lobe is, and what its functions are? A. Well, a regular lobe is about that size (indicating). A man Mr. O'Brien's size. Its purpose is to put oxygen into the blood and to take carbondioxide out of the blood, which is the normal breathing process.

Q. What effect does the loss of a lobe have in a man? A. In a young man it doesn't have a great deal. In an older person, who does not adjust as well to the absence of bodily tissue, they are apt to become more short of breath after such an operation.

Q. Have you an opinion, Doctor, as to whether or not the condition of that man as a result of this operation and losing a lobe, have you an opinion as to whether it has an effect on his [276] ability to work? A. I have followed Mr. O'Brien quite closely ever since the operation, seeing him in the beginning at weekly intervals, and recently about every three or four months. He is much more short of breath than he was, with the result that he is incapacitated now from doing any heavy work. He can get around all right, walk around all right. I guess the people in this

court room have seen him. But he is incapable of doing heavy work without getting extremely short of breath.

Q. Will that breath condition improve or not? A. No, it will not improve.

Q. Will you describe to the jury this operation of the leg, as regards tying off the veins? A. I wasn't there at the time.

Q. All right. A. They make two incisions, one in either groin. They go in and identify the main vein, which is called the femoral vein, in that region, and tie its main branch, called the superficial femoral, and it's like the main root, a turf root of a tree coming up. It leaves the little side branches intact, so that the patient's circulation is not tremendously interfered with. They usually have some swimming until they readjust. The return of blood is adequate, after such an operation, but the big clots that usually form in the superficial femoral vein, they can no longer pass upward because [277] the vein has been tied and interrupted.

Mr. Prendergast: All right. Your witness, Mr. Mahony.

Excuse me. The most important thing I left out.

Q. What is your bill for services, Doctor? A. To Mr. O'Brien?

Q. Yes. A. Well, he's a ward patient. We don't charge ward patients.

Cross-examination by Mr. Mahony

X-Q. Well, Doctor, did you examine the record of the Emerson Hospital at any time? A. I can't remember. I might have. I looked at the X-rays from the Emerson Hospital. I think I read a letter from them.

X-Q. Have you got it, the material you had from the Emerson Hospital? A. I don't see it here. There might be a letter in this accumulation of material. I don't know.

X-Q. Did you get copies of the Saugus Hospital record? A. I have seen that record. It is right in front of me.

X-Q. Did you see it before you made your diagnosis? A. I believe we received a report from the Saugus Hospital shortly after Mr. O'Brien came into the hospital. That report was not entirely necessary as Mr. O'Brien was capable of informing us quite clearly as to what had happened.

X-Q. If you will just answer my question: Did you get a copy of [278] the Saugus Hospital report before you made your diagnosis? A. I don't remember whether we got a written report or not.

X-Q. Well, this man you learned had several broken ribs on the left side of his body? A. Yes.

X-Q. And with an effusion into the pleural cavity? A. Yes.

X-Q. Now you say that had nothing whatever to do with this pulmonary infarct that you have described, is that correct? A. I don't remember saying this. Did I?

X-Q. That is the position you take, is it not? A. Well, why?

X-Q. Well, I have the privilege of asking the questions.

Mr. Prendergast: That isn't a question. That was a statement by you.

X-Q. You do, do you not, eliminate the fractured ribs as having caused any clot which in turn caused the pulmonary infarct? A. I would say the fractured ribs were an unlikely cause.

X-Q. And in your opinion were not the cause, that is correct, isn't it? A. I would say they most probably were not the cause.

X-Q. Well, again, in your opinion, they were not the cause, that is correct, isn't it? A. Most probably not.

X-Q. Now in a laceration that he is said to have had in his [279] forehead over the left eye, that you eliminate as

having any causal relation to the pulmonary infarct, is that correct? A. I would say it was unlikely.

X-Q. Bleeding of the nose, which he had at the time he went to the Saugus Hospital, you eliminate that as having any causal relation to the pulmonary infarct, correct? A. Yes.

X-Q. Any abrasions on the forearms, you eliminate that as having anything to do with the pulmonary infarct? A. I would say they would be unlikely causes.

X-Q. And that would be true of abrasions below the knee that might have been noticed on June 21 or June 22 of 1952, you would eliminate those? A. Not completely.

X-Q. You would not? A. No.

X-Q. Well, bruises which appeared on June 22 or June 21 and which were eliminated and cleared up within 10 days or two weeks; you would eliminate those, would you not, as having any causal relation to the pulmonary infarct? A. Well, this is a very difficult point.

X-Q. Well, can you answer the question, Doctor?

Mr. Prendergast: He is answering it.

A. I will try to as best I can.

X-Q. All right. [280] A. His legs were injured at that time and then he subsequently had surgery. His veins would be more apt to form clots than if they had not had a recent injury.

X-Q. Did you learn he had no surgery to the lower legs for any abrasions? A. Didn't he have some attention to the laceration on the leg?

X-Q. No surgery. A. None at all?

X-Q. That's right. A. It doesn't make a great deal of difference.

X-Q. I see. Well, did you learn, Doctor, he had—what is it you call it—thrombophlebitis? Did you learn that? A. No. I don't remember his having thrombophlebitis. Is that in the record?

X-Q. Yes.

Mr. Prendergast: Wait a minute. Where is it in the record?

Mr. Mahony: In the Saugus Hospital record.

Mr. Prendergast: It says thrombophlebitis?

Mr. Mahony: Yes.

Mr. Prendergast: I didn't see it.

X-Q. Will you see, Doctor, if you have the record?

Mr. Prendergast: Maybe you can point it out to him.

X-Q. Well; let's see. Let's go through the record, Doctor. A. I'm trying to find where this is.

[281] X-Q. All right. Do you have the record before you? A. Yes.

X-Q. The Massachusetts Memorial record?

Mr. Prendergast: Massachusetts Memorial?

A. Saugus?

X-Q. Do you have the Massachusetts Memorial? A. Yes.

X-Q. Have you got it? A. Where is this thrombophlebitis business?

X-Q. If you will just let me ask the questions.

Mr. Prendergast: Now just a minute. Do you withdraw the question you asked before?

Mr. Mahony: Yes, until I go through the record.

Mr. Prendergast: All right.

X-Q. You got a history, did you, Doctor, from the patient that he had a lacerated left lung, which was found at the Saugus Hospital? A. Yes.

X-Q. Did you take that into consideration in your diagnosis? A. In what way?

X-Q. I just asked you: Did you take that into consideration in your diagnosis? A. We took into consideration the fact he had a lacerated left lung which had healed.

X-Q. That is in the left lung, right, the fractured ribs?

[282] A. Yes.

X-Q. And you excluded that as having any causal rela-

due to the infarct in the right lung? A. That would be an extremely unlikely cause.

X-Q. I see. Did you learn as you looked at the Saugus Hospital record that there was no diagnosis of laceration of the left lung? A. Let me look at the record and see.

X-Q. Surely. Take your time.

The Court: Take your time, Doctor.

Mr. Prendergast: Will this help you in any way (handing document)?

The Witness: No. I want the earlier X-ray studies from the Saugus Hospital, because if there was air in the chest cavity then he would have had to have a laceration of the lung.

Mr. Prendergast: You are talking about the left lung, Mr. Mahony?

Mr. Mahony: At the present time, and having in mind Dr. Burke's testimony.

A. I couldn't tell from a brief survey of this as to whether or not he had a laceration of the lung.

Mr. Prendergast: Of the left lung?

The Witness: Of the left lung.

X-Q. In the hospital record of the Massachusetts Memorial Hospital, have you the record there which says he had a cough, [283] and since the clearing of the cough the patient is gradually getting better? A. It says: "During the next four to five days"—this was in February—"the patient found that his mild cough produced gradually less blood, and that the blood became gradually darker in color."

X-Q. Beginning with? A. That was beginning on the 12th of February.

X-Q. "Since the clearing of the cough, chest pain and hemoptysis"—what is that? A. Coughing up of blood.

X-Q. [Continuing] "—the patient has been gradually

getting better, except for minimal light-headedness when standing, which is now all gone." A. That's correct.

X-Q. "No andrexia,—" and what is that? A. Loss of appetite.

X-Q. [Continuing] "—dyspnea,—" A. Shortness of breath.

X-Q. "—orthopnea,—" A. Inability to breath that night without sitting up.

X-Q. "—chronic cough".

The Court: What is the medical term —orthopnea?

The Witness: Yes, sir.

X-Q. "No chronic cough, wheeze, chest pain, hoarseness for the [284] past three weeks." Is that right? A. That is all in the record, yes.

X-Q. "At no time in his history is there any sign of thrombophlebitis of the legs," A. That's correct.

X-Q. Is that there? A. Yes, it is there.

X-Q. What is thrombophlebitis? A. Thrombophlebitis is an inflammation in the veins of the leg with a great deal of soreness down along the veins. It is most frequently seen in women after childbirth, but it can occasionally occur in anyone spontaneously.

X-Q. It is a circulatory disturbance? A. Yes, it is.

X-Q. Now let me get that. You say it can occur in anybody spontaneously? A. That is correct.

X-Q. Without any reference to an accident or injury whatever? A. It can.

X-Q. And is it more likely to happen with increasing age? A. I don't think I can answer that question. I don't really know.

X-Q. So that a person without any accident at all—strike it out. If you will follow along with that record, Doctor. "No sign of thrombophlebitis at any time. He admits to slight [285] soreness of the calves, but no swelling, redness, tenderness thereof between the left femoral

herniorrhaphy—" And what is that? A. Repair of the hernia.

X-Q. And what is the next one? A. "—and the present." The present was the time at which he was admitted to Massachusetts Memorial Hospital, the 7th of March.

X-Q. No evidence of any tenderness during that period of time? A. That's right.

X-Q. That is from the time of the operation with reference to the hernias up to the time that he was examined at your hospital? A. That's correct.

X-Q. I think you have in there also, have you not, Doctor, in the system review that— A. You mean on the examination or history?

X-Q. After the medical history. A. All right.

X-Q. "System Review: Negative except for the gastro-intestinal tract." Now did that examination—it consisted of what? A. This is a history, not an examination.

X-Q. A history? A. A history consisting of asking the patient questions.

X-Q. This is part of the history? A. That is correct.

[286] X-Q. Now so far as the examination is concerned, did you make the examination? A. I examined him but did not make the one that is recorded in the record.

X-Q. Do you know who did make that examination? A. It is signed by Merrill, who was a resident at that time.

X-Q. In the Massachusetts Memorial Hospital? A. That's correct.

X-Q. Well, now so far as that examination is concerned, it showed a well developed and nourished person, is that correct? A. You left out one word—"slightly cachectic white male".

X-Q. I am coming to that. "Well developed and nourished," is that correct? A. Correct.

X-Q. No evidence of emaciation at all? A. It says "slightly cachectic".

X-Q. What does that mean? A. That means slight emaciation.

X-Q. "—white male in no distress." Correct? A. That's right.

X-Q. "Head: No exostosis or defect." What does that mean? A. It means there is no outgrowth of bone.

X-Q. "Healed left frontal scar. Eyes: Pupils round, equal, regular; normal extra-ocular movements. Nose: No obstruction. Mouth: Upper plate, lower bridge, remaining teeth in poor [287] condition." Right, so far? A. Yes.

X-Q. "Neck: No masses, dilated veins, tracheal deviation. Lungs clear and resonant." Right? A. Correct.

X-Q. That examination was made on what date? A. On the 7th of March.

X-Q. What does "clear and resonant" mean so far as the lungs are concerned? A. It means there are no noises in them suggestive of pneumonia. In other words, squeaks and wheezes, various noises of that sort. Resonant means, when you tap the chest you get a good hollow sound to it.

X-Q. Sounds not consistent with any obstruction in the lungs? A. Well, it doesn't quite say that, no. You can have very minor changes in the lung and not be able to pick up anything on physical examination.

X-Q. Well, let's go on. "Slightly prolonged breath sounds on exploration over right lung posteriorally." That is in the back? A. Yes.

X-Q. "Heart: Normal size, shape, sounds. Abdomen: Scaphoid, soft,—" What does that mean? A. The scaphoid means it isn't protuberant.

X-Q. [Continuing] "—muscular, no masses, spasm, tenderness, [288] rebound tenderness. Well-healed inguinal incision." Is that correct? A. That's correct.

X-Q. "Normal male genitalia. Rectal: No hemorrhoids, prostate firm, 2x normal size. Extremities: No varices;—" What does that mean? A. No varicose veins.

X-Q. That is no varicose veins in either leg? A. Yes.

X-Q. Correct? A. Yes.

X-Q. "—feet cold and dry with good dorsalis pedis pulses." What does that mean? A. It means that he has got good arterial pulsations all the ways down. The dorsalis pedis pulses is on the top part of the foot. You feel that to be sure they have got good arterial circulation.

X-Q. And then the X-ray reports follow. "X-Ray Reports: 3-7-53: Chest: There is ill-defined density in the apical portion of the right lower lobe." Is that correct? A. Wait until I find the X-ray reports. [A pause.] Yes.

X-Q. "There is ill-defined density in the apical portion of the right lower lobe. This does not have the appearance of an organizing infarct." Is that correct? A. That's correct.

X-Q. That means of a pulmonary infarct, does it not? [289] A. That's correct.

X-Q. "No discrete mass is visualized." What is meant by a "discrete mass"? A. Clear-cut.

X-Q. That means that in the X-ray there was no clear-cut mass seen in the lung? A. No clear-cut.

X-Q. "The appearance does not permit definite conclusions." Right? A. That's correct.

X-Q. So that up to that time there was no diagnosis of any pulmonary infarct, was there, Doctor? A. No diagnosis had been established of any sort in regard to the shadows seen in the X-ray film.

X-Q. It goes on with reference to the laminograms, which have been testified to by Dr. Burke. Then it goes on and says: "The lesion appears to be quite dense with a radiolucent shadow in which there is seen a small fleck of calcium." A. That's correct.

X-Q. What does that mean, Doctor? A. It means there is a hollow area and a bit of calcium in it.

X-Q. Calcium is a mineral, is it? A. Yes.

X-Q. And in this X-ray or laminogram that was taken there was found some calcium in this ill-defined mass? [290] X-Q. Do you eliminate that calcium as having anything to do with the pulmonary infarct? A. Sometimes it appears in an infarct; sometimes it does not.

X-Q. Well, I will ask you, Doctor, do you eliminate it as having any causal relation to the infarct? A. Did the calcium cause it?

X-Q. Did it have any causal relation with the development of the infarct? A. I don't think so.

X-Q. You don't think so. Then you have: "The findings are consistent with a cavitary lesion." A. Yes.

X-Q. "There is the possibility of tuberculosis,—" A. Yes.

X-Q. That was eliminated, you say? A. As far as we could eliminate it.

X-Q. Yes. "—the possibility of ***neoplasm—"? That was eliminated? A. It was eliminated by the pathologist's report.

X-Q. I say it was eliminated? A. You can't say—when you didn't ask when—

The Court: What is neoplasm?

The Witness: Neoplasm is a word for a cancer. It means a new growth. It is a little more correct term than cancer. It takes in a lot of benign tumors as well.

[291] X-Q. After all the tests were made and after all the examinations cancer was eliminated in this case, wasn't it, Doctor? A. It was only eliminated by the pathologist's examination of the piece of lung submitted to him after the operation.

X-Q. So far as the record is concerned and so far as the pathologist's report is concerned, no cancer was found?

Mr. Prendergast: Objection. The hospital record speaks for itself.

X-Q. That is correct, isn't it, Doctor? A. Yes.

X-Q. "—chronic abscess"—"possibility of chronic abscess"? A. Yes.

X-Q. That was eliminated? A. Again by the pathologist.

X-Q. So far as the record is concerned, no chronic abscess was found? A. That's correct.

Mr. Prendergast: Well, I object to possibilities.

Mr. Mahony: I am merely reading from the hospital record.

A. Well, what are you talking about? I'm afraid I don't follow you.

[292] X-Q. Don't you? Well, if you look at the part I have been reading from, Doctor, "There is the possibility of—" Does that appear in the hospital record? A. "The possibility of tuberculosis, neoplasm, chronic abscess or an infarct."

X-Q. That is the part I have been asking you about.

The Court: What do you object to, Mr. Prendergast?

Mr. Prendergast: It's all over now.

The Court: No, it isn't.

Mr. Prendergast: It's in. I'm satisfied.

The Court: As a matter of law we don't deal with possibilities. We deal with medical probabilities.

The Witness: That is correct. He was reading the hospital record.

The Court: You deal with medical probabilities, if you will, Doctor.

The Witness: Yes, sir, I will.

X-Q. I might as well go on reading the record, Doctor. "March 20, 1953: Chest; the right diaphragm is markedly elevated. There has been resention—" Is that correct? A. Resection.

X-Q. Resection? A. That means removal.

X-Q. "There has been resection of the right fifth rib and there is a great deal of subcutaneous emphysema."

[293] A. Air in the tissues.

X Q. "The mediastinal shadow is widened to the right." What does that mean? A. It means the shadow of the organs which occupy the middle of the chest has shifted more to the right, which is consistent with removal of lung in the right side.

X Q. This is after the operation at the Massachusetts Memorial? A. Yes.

X Q. "The trachea is deviated to the right." A. Yes.

X Q. "The left lung field is not remarkable." Correct? A. Yes.

The Court: What does that mean? Tell the jury.

The Witness: If you take an X-ray, as this was taken, the day after an operation, you take it to discover a number of things—how well the good lung on the opposite side is working, how well the remaining lung on that side has expanded, how much fluid and air are in the chest cavity. Those X-ray findings are consistent with a pretty good post operative course. In other words, the right lung was beginning to expand with some fluid and the organ shifted to that side somewhat and the left lung functioned normally.

X Q. You say the left lung functioned normally? A. It had a normal appearance, yes.

X Q. So that there was no evidence of any pulmonary infarct in [294] the left lung, correct? A. That's correct.

X Q. And all these ribs that were broken were on the left side? A. That's correct.

X Q. And whatever effusion there had been into the pleural cavity was in front of the lung, between the left lung and the left chest wall, wasn't it? A. It was in the left chest cavity. You mean at the time of the fractured ribs?

X Q. Yes. A. I don't remember in what part of the chest cavity it was, but it was in the chest cavity, though.

X Q. "The left lung field is not remarkable. Impression:

post-operative chest. The possibility of mediastinal effusion is raised. March 20, 1953: Chest: the previously noted mediastinal widening has diminished markedly in extent." A. Do you have March 27th?

X-Q. March 20th. A. March 27th?

X-Q. Do you find it? A. Yes, I thought you had finished reading that.

X-Q. No. March 20, 1953. "The previously noted mediastinal widening has diminished markedly in extent." Do you find that part? A. Oh, yes, I do.

[295] X-Q. "The atelectatic areas in the right lower lung field have not changed markedly." That is with reference to the collapse of the lung? A. That's correct.

X-Q. "There has been some resolution of the mediastinal effusion." What does that mean? A. Fluid in the central part of the chest.

X-Q. "There is no evidence of pleural effusion." What does that mean? A. Fluid in the chest cavity.

X-Q. "March 21, 1953: Chest: comparison with previous examination of 3-20-53 shows some clearing of the pulmonary infiltrates in the right lower lung field." What does that mean? A. It means the lung field looked clearer. The X-ray looked clearer.

X-Q. "No change in widening of the mediastinum." A. Right.

X-Q. "March 27, 1953: Comparison with the films made on 3-21-53 shows still further narrowing of the mediastinal shadow. There remains widening of the mediastinum to the right at the level of the aortic arch. There is a well-defined homogeneous density at the cardiohepatic angle—" What does that mean? A. That is the area where the diaphragm over the liver and heart come together. In other words, this corner here [296]. (indicating) in the chest X-ray—

The Court: Where is it, Doctor?

The Witness: Right, here, sir, where the heart lies on top of the diaphragm. This is the angle here.

X-Q. Then the next heading is "Electrocardiographic report: within normal limits." That deals with the heart? A. Yes, that's right.

X-Q. "Within normal limits"? A. That's correct.

X-Q. Then the next item is "Operations: Bronchoscopy 3-9-53." Opposite that you have "Right exploratory thoracotomy." A. Wait a minute. What was the first thing you said?

X-Q. "Operations: Bronchoscopy, March 9, 1953." A. Yes.

X-Q. "Right exploratory thoracotomy." A. That means opening up the right chest cavity to look at what is inside.

X-Q. The next item is "Right lower lobectomy March 19, 1953". A. No. The thoracotomy and lobectomy took place at the same time.

X-Q. On March 9? A. No, sir, March 19.

X-Q. I thought the bronchoscopy was March 9. A. That's correct.

X-Q. Well, I am asking you: On March 9 was the exploratory [297] thoracotomy? A. No.

X-Q. Well, does this show "Operations: Bronchoscopy March 9, 1953"? A. That's right.

X-Q. "Right exploratory thoracotomy"? A. Here—put that down in this sentence and it reads, "Right exploratory thoracotomy. Right lower lobectomy March 19, 1953."

X-Q. Those two lines—am I reading this correctly—"Operations: Bronchoscopy 3-9-53." A. Yes.

X-Q. "Right exploratory thoracotomy." A. Yes.

X-Q. Is that correct? A. That's correct.

X-Q. "Right lower lobectomy 3-19-53." A. That's right.

X-Q. "Division and ligation of superficial vein, bilaterally, 3-21-53." A. That's right.

X-Q. The next item is "Pathology: 3-19-53:" Is that correct? A. Yes.

X-Q. "Lung: diagnosis was infarct of lung, right lower lobe, organizing, consistent with four to six weeks' duration."

[298] X-Q. Was that your report or not? A. That is the pathologist's report.

X-Q. Is there another report, a definite report from the pathologist in the record? A. Yes. It goes into more detail.

X-Q. May I see it, please? A. Yes, sir. Shall I read it?

X-Q. No. Let me read it. "Pathological Laboratory"—Is that right? A. Yes.

X-Q. "Thoracic Service. Dr. Madoff." He was the pathologist? A. No, the thoracic surgeon.

X-Q. "Organ or tissue involved: Right lower lobe. Description of specimen: Specimen consists of a lower lobe weighing 260 grams and measuring 17 by 15 centimeters. All of the segments are well aerated, except for the superior segment which is atelectatic." Is that correct? A. Yes.

X-Q. "There is a well-circumscribed palpable mass measuring 3 to 5 centimeters in diameter." A centimeter roughly is a third of an inch? A. Two and a half centimeters to an inch.

X-Q. "—hard and firmly adherent to the segment. There are no infarcted areas or other nodular areas except the one mentioned in the superior segment." Correct? [299] A. Correct.

X-Q. "Uncut section: All lung tissue is well aerated except for the superior segment of the right lower lobe. The segment of aerated section shows dark red and green areas at the level of the mass described above. No purulent discharges seen. The arteries are open. At the level of the segment of the right lower lobe there is a thrombus measuring two and a half centimeters completely filling

the artery. In other arteries some recent post-operative clots are found. The veins are filled with clots. The bronchi are open and no obstruction is seen. There is some mucous present. The mucous is smooth and glistening. ASMIR". Is that correct? A. Yes.

X-Q. "Diagnosis: Infarct of the lung, right lower lobe, organizing,"— And that means developing? A. No. It means the fibrous tissues are beginning to invade.

X-Q. "—consistent with four to six weeks' duration." That is the whole report, isn't it? A. That's correct.

The Court: May I suggest we take a five-minute recess? I know, Doctor, you're anxious to get back to your office.

[Short recess.]

X-Q. Doctor, have you there before you the reports of the X-rays made on March 7, 1953? [300] A. Yes.

X-Q. Does that show, so far as the right lung field is concerned, the density had decreased? A. The X-ray report does not deal with that. It says, "There is an ill-defined density in the apical portion of the right lower lobe."

X-Q. Dr. Burke testified with reference to that X-ray, that he demonstrated to the jury, that the density was decreased and not so well-defined and was fuzzy and that resolution was taking place. Do you find that report he had? A. I don't see it here.

X-Q. Then on March 7— A. This is March 7th you are talking about?

X-Q. Yes. Are there different X-rays that were taken on that day? A. Well, I don't know. All I have here is the X-ray report.

X-Q. All right. If the density was decreased over what it had been before and if resolution was taking place, that would mean, would it not, that the mass, if there was a mass there, was diminishing in size? A. Well, not neces-

sarily. If there was much inflammation around the mass, the inflammation will sometimes subside.

X-Q. You say not necessarily? A. Not necessarily.

X-Q. Well, the word decreased—density decreased, that would [301] mean the mass was less resistant to X-rays? A. What do you mean by that? Less resistant to X-rays?

X-Q. Well, strike it out. If you knew, Doctor, that it was a pulmonary infaret, you would not have opened the chest wall, would you? A. Yes, but—

X-Q. Even though—

Mr. Prendergast: Well, may the Doctor answer further if he feels like it, without interruption, your Honor?

Mr. Mahony: I understood him to say Yes.

Mr. Prendergast: He started to say something else.

A. [Continuing] I couldn't know—other than the pathological examination of the tissue—

X-Q. You mean— A. —that it was—

X-Q. You mean you would have gone in anyway even though you knew it was a pulmonary infaret? A. How could we have known? It required the services of the pathologist, and the pathologist only could tell when the lung was given to him.

Mr. Prendergast: He said he couldn't.

X-Q. Is that right? A. It would have been impossible to have told—

[302] Mr. Mahony: May I have an answer to the question?

X-Q. Even though you knew it was a pulmonary infaret—

Mr. Prendergast: I pray your Honor's judgment.

The Court: He said he couldn't tell until the pathologist examined that.

The Witness: The pathologist would have to examine it.

X-Q. If you knew it was a pulmonary infaret, Doctor,

before you went ahead with the exploratory operation—would you have gone ahead with the exploratory operation?

Mr. Prendergast: I object to the impossible situation put in the question.

The Court: Well, if the Doctor can answer the question I will let him answer it. Go ahead.

A. We don't desire to operate on pulmonary infarcts because the patient does not benefit from their removal. Does that answer it?

X-Q. Yes, Doctor. I notice you said in your direct examination that Mr. O'Brien told you that he received a hernia—was that what you said—in the accident? A. Yes that a hernia occurred as a result of the accident.

X-Q. That is what he told you? A. Yes.

X-Q. Well, Doctor, hernias ordinarily come from repeated increased abdominal pressure? [303] A. Or they can come from one instance of violence.

X-Q. If they come from one instance of violence—do you call that an acute hernia? A. That would be a reasonable term.

X-Q. If an acute hernia were to be caused by a single act of violence, wouldn't you expect to find some evidence of bruising or laceration or abrasion in the area of the groin or lower abdomen? A. No, not necessarily. Quite frequently a person will lift a heavy object and a hernia will come out, and there will be no evidence of bruising.

X-Q. You say by lifting a heavy object? A. Yes.

X-Q. Is that correct? A. That's correct.

X-Q. That is what you mean by such a single act of violence? A. That is a frequent one. That is not universal, however.

X-Q. If it were to come from violence from the outside, Doctor, and not from a lift, wouldn't you expect to find some evidence by way of bruising, laceration or abrasion in the area of the groin or the lower abdomen? A. The

accident causes an increase in abdominal pressure the same way lifting does—sudden strain, wrenching, twisting something in an accident. You don't have direct trauma to the inguinal region to cause the hernia.

[304] X-Q. Assuming there was such a twisting or increased pressure, that is— A. Yes.

X-Q. If the person on that day or the day following, June 21 or June 22, had a hernia which was the size of a small orange and which was easily reducible, that would indicate to you, would it not, the ring through which the hernia had come had been increased in size, its diameter increased prior to the protrusion, correct? A. Correct.

X-Q. That would indicate a widening? A. At the time of the injury.

X-Q. That would indicate to you, would it not, an increase in the diameter of the ring taking place over some period of time? A. No.

Mr. Prendergast: What was the answer?

The Witness: No. Well, you can—a ring can be broken apart at the time of the injury or heavy lifting.

X-Q. If it occurred at that time, Doctor, wouldn't you expect some evidence on the outside of the body? A. No. I have never seen evidence of that sort.

X-Q. You wouldn't? A. And I have seen many hundreds of hernias.

Mr. Mahony: I think that's all.

[305] *Redirect Examination by Mr. Prendergast.*

Q. Doctor, in cross-examination Mr. Mahony asked you something about thrombophlebitis. —may it produce or may it not produce a clot spontaneously in anyone? I think you said it could. Do you remember that? A. You mean a clot may occur spontaneously, an infarct may occur spontaneously? And I said that it could?

Q. Yes. You were particularly talking about a thrombophlebitis at the time, weren't you? A. Not specifically.

Q. All right. Were you talking about probabilities or possibilities at that time? A. We were talking about possibilities.

Mr. Prendergast: Then I ask that that testimony relative to that be stricken from the record.

Mr. Mahony: I object.

Mr. Prendergast: Or that the jury be instructed the testimony was as to possibilities and is not to be considered by them.

Mr. Mahony: I object. That was in cross-examination.

The Court: I'm going to tell the jury—I don't know what the questions were at the time—but what we deal in are probabilities and not possibilities.

Q. Now, Doctor, Mr. Mahony had you read—

The Court: What you will deal in are probabilities [306] and not possibilities.

Q. Mr. Mahony had you read or he read to you a copy of this document which I have—Discharge Note. A. From the Massachusetts Memorial Hospital?

Q. Yes. A. That's correct.

Q. He read in everything with the exception of the Final Diagnosis.

Mr. Mahony: I read everything that was on the report that I have, Mr. Prendergast.

Mr. Prendergast: Let's see.

[Counsel confer.]

Mr. Prendergast: Haven't you this (indicating)?

Mr. Mahony: Didn't I read that?

Mr. Prendergast: No, you didn't. That's what I want in.

Mr. Mahony: I haven't the slightest objection.

Q. "Final Diagnosis: Pulmonary infarct, thrombophlebitis, left leg." A. That's correct.

Q. Now will you kindly tell this jury whether or not that was a diagnosis made for or relates to something before the operation or after the operation on Mr. O'Brien? A. Mr. O'Brien had no record of previous thrombophlebitis either in the Saugus Hospital or prior to admission to the [307] Saugus Hospital or when he was admitted to the Massachusetts Memorial Hospital. However, after he had his veins tied he developed tenderness in his left calf, consistent with a diagnosis of thrombophlebitis of his left leg. When a resident writes the final summary in a record, a hospital record, he is supposed to list all the different diagnoses, not only what the patient came in with, what his chief diagnosis was, but if there were any complications to name them in the record so the record gives a complete picture. They try, in so far as they are able to do so, to list everything and that is why thrombophlebitis was listed there. But it was post-operative thrombophlebitis, caused by the ligation of his veins.

Q. Caused by the ligation of his veins. The ligation of his veins took place when? A. Two days after the removal of the right lower lobe of his lung.

Q. Is that what is called post-venous interruptus or something? A. Post-operative thrombophlebitis.

Mr. Mahony: Do I understand him to say that is after the operation at the Massachusetts Memorial, not after the operation at Saugus?

The Witness: That is correct.

Mr. Prendergast: After Massachusetts Memorial.

Q. Will you kindly refer to the record here and read the entries [308] that show you the man had trouble with his veins after the operation was performed at the Massachusetts Memorial Hospital? A. On March 23rd, 1953.

Q. Read it, will you, please? A. It says: "Patient comfortable except for left calf pain. Chest: Clear, covering well." That is the note upon which it is based.

Mr. Prendergast: That is all.

Re-cross-examination by Mr. Mahony

X-Q. Just one other question. That note, Doctor, of thrombophlebitis in the left leg, occurring after the operation at the Massachusetts Memorial Hospital, had nothing whatever to do with causing the pulmonary infarct? A. Tha 's correct.

Mr. Mahony: That's all.

Mr. Prendergast: That's all, Doctor.

Now the girl from the Saugus Hospital, please.

GRACE R. FRASER, Resumed

Direct Examination by Mr. Prendergast, Continued

Q. Did you bring in the bill for Mr. O'Brien at the Saugus Hospital? A. Yes.

Q. Read it to the jury? A. I left it in my pocketbook.

Q. Where? [309] A. In the green bag there. They were not itemized.

Q. That's all right. A. This is one from June 21, 1952 to July 26, 1952. That was 34 days. $424.66.

Q. That is the total bill? A. Yes.

Q. For the first visit? A. Yes. The second visit was from January 4, 1953 to March 6, 1953, 61 days, $1050.42.

Q. My man didn't hear it. What was it? A. $1050.42.

Q. The total of $1472.62? A. $1475.08.

Q. All right. $1475.08. A. Did you decide what you wanted read?

Q. Well, we didn't see each other from 12 o'clock on. You start reading the bedside notes. Let's start it that way. A. June 21, 1952. Patient admitted ambulatory to room A. Diagnosis: Nothing there. Do you want the time and the medication given?

Q. Oh, yes. Give the medication.

[Bedside and or nursing notes read by the witness.]

Mr. Prendergast: Shall we stop here, your Honor?

The Court: The hour has arrived?

Mr. Prendergast: It has.

[310] The Court: Will it be difficult for you to come back tomorrow?

The Witness: Not as far as I am concerned.

The Court: All right. We will take a recess now until tomorrow.

Please form no opinion in connection with any of the details of the testimony, because you have only heard a part of it. As you can observe, it is in the orderly presentation of evidence that it becomes necessary to examine doctors, and cross-examine doctors, and it becomes necessary that each party has her or his day in court. Please free your minds from any formula which would lead you to any conclusion except that which will give you an afternoon and night of relaxation and freedom from any thoughts in connection with any of the evidence in this case. God willing I will see you tomorrow morning at 10 o'clock.

[Whereupon, at 4 p.m., the trial was recessed to Friday, December 2, 1955, at 10 a.m.]

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[311] FOURTH DAY

Court Room No. 5
Federal Building
Boston, Massachusetts
December 2, 1955

Mr. Prendergast: If it please Your Honor, I think that if you will allow me, I will suspend with this witness, I will have this young man, when he comes in, go through the hospital records on that item and see if we cannot cut out a lot of reading. He is not here now. As soon as he comes in, I will have him do it.

The Court: All right. No objection?

Mr. Mahony: No.

Mr. Prendergast: Doctor Hobart, will you come and take the stand?

HAROLD M. HOBART, Sworn

Direct Examination by Mr. Prendergast

Q. Your name is what, sir? A. Harold M. Hobart.

Q. You live where? A. Washington, D. C.

Q. And what is the street address? A. 5116 Manning Place.

Q. Are you married? A. Yes, sir.

Q. Your wife was with you on the day this accident occurred? [312] A. Yes, sir.

Q. You were driving the car? A. Yes, sir.

Q. And the car was what kind? A. Chrysler.

Q. What year? A. 1949.

Q. And what model? A. Five passenger sedan.

Q. Anybody else in the car with you? A. My wife.

Q. I mean, sir, anybody else? A. No, sir.

Q. Besides you two. Now you had left Washington when previous to this accident? I am getting down to this. A. About two weeks before.

Q. And where had you come, from Washington, that is, when had you got into Massachusetts? A. When had I gotten in, in it was about two weeks before the accident.

Q. So that you got into Massachusetts sometime, we will say, around June 1st? A. Well, it was after that.

Q. All right, approximately what date? A. It was about two weeks before the accident.

[313] Q. Would you say it was around June 5? A. The 5th or 7th, in there.

Q. Was that the first time that year you had been into Massachusetts with your car? A. Yes, sir.

Q. All right. Now where had you stopped the night before, that is on June 20 of 1952? A. We were in Boston.

Q. What place in Boston? A. We were out on, staying out in Brookline.

Q. Do you mind giving us the name and address? A. The address is—it was off Longwood Apartments there, I don't remember the exact street address.

Q. Who was the man—were you with friends? Did you sublease an apartment? A. We sub-leased a room, not an apartment.

Q. For the two weeks? A. That is right.

Q. You do not know the number of the street? A. I don't recall just exactly right now.

Q. Although you lived there for two weeks? A. That is right.

Q. You don't recall the street or the number of the street? A. No; I don't, right now. It was an apartment right out there in Brookline, near Coolidge Corners.

[314] Q. Well that morning, that is the morning of June 21st, 152, you left Longwood some place, Longwood Avenue or Longwood Street, Brookline? A. That is right.

Q. You were going where? A. I went down to the Massachusetts General Hospital.

Q. What time did you go to the Massachusetts General Hospital? A. Well we got down there between 8 and 9 in the morning.

Q. You stayed there for some time, did you? A. I was there all morning.

Q. You left there then at about what time? A. Oh, about 12; between 12, 12:30, along in there.

Q. Well, I don't want to be too much of a stickler, I would appreciate it if you could be a little bit closer than the half hour. Did you leave nearer 12 or 12:30? A. I can not tell you, sir. The lectures were over at 12 o'clock. We left there after that.

Q. You attended some lectures? A. Yes.

Q. I suppose after the lectures were over, you had to come downstairs or walk through corridors? A. That is right.

Q. Get your coats and hats, and other little belongings you may have, went outside and got into your car? A. That is right.

[315] Q. Then you drove in what direction? A. We went over to Cambridge, started out Route 2.

Q. You went by Technology there? A. In that direction.

Q. You turned left, took Route No. 2, right through, is that right? A. That is right. We stopped for lunch.

Q. Did you stop for lunch? A. Yes.

Q. After you had left the hospital? A. Yes.

Q. Where did you stop for lunch? That was at a Howard Johnson, I believe it is, out in Cambridge.

Q. On Memorial Drive there? A. I guess that is the drive, I guess that is Memorial Drive, Cambridge.

Q. In Cambridge. It is right close to Technology. A. My geography is not too good, in Boston.

Q. Neither is mine. At any rate, you stopped for lunch at Johnson's? A. That is right.

Q. That was some time in the noon hour, wasn't it? A. That is right.

Q. How long would you say you stayed at Johnson's, having [316] lunch? A. Oh, probably half an hour, three-quarters of an hour, something like that.

Q. And what time would you say you left Johnson's? A. Oh, around, maybe 1:30, between one and 1:30, along in there.

Q. All right. Well, now, after leaving Johnson's between one and 1:30, you then drove out Route 2 through Cambridge, through Arlington, through Lexington, through Bedford, Concord, got into Concord, is that right? A. We

went through, we went past, we were past Concord a little ways, yes.

Q. I mean you went through all the locations I have named to get to where this accident happened? A. I do not know the names of the towns, we were out on Route 2.

Q. How far would you say it is from Technology right there at Massachusetts Avenue, out to the Concord-Acton line? A. I don't know, sir.

Q. Would you approximate it as being close to 20-25 miles? A. I don't know, sir.

Q. No? A. No; I don't.

Q. All right. Well, you were driving, were you? A. Yes, sir.

Q. Were you familiar with the road? [317] A. Not wholly, sir.

Q. Well Route 2 is a four-lane road, part of the way, isn't it? A. I think that is correct.

Q. Part of the way it is divided by a reservation in the center? A. Yes.

Q. And then finally it breaks down to, well, it is a four-lane road practically from Cambridge, a part of Cambridge there, right over into the Concord Reformatory, isn't it? A. I do not know where the Concord Reformatory is.

Q. All right. A. It is four-lane part of the way, and three-lane part of the way.

Q. Now you got over to Concord and at some time you approached the vicinity where this accident occurred, is that right? A. That is right.

Q. Will you tell us where you were going to go that day? A. Where we intended to go?

Q. Yes. A. We intended to go to Fitchburg and into Vermont.

Q. What part of Vermont were you aiming for? A. In the vicinity of Fairview.

Q. Can't you tell us exactly where it was you were going? A. West Addison, Vermont.

Q. Now before leaving Boston, had you looked up the distance it [318] was from Boston, to your intended location? A. Not the specific distance, no.

Q. Did you have some idea before you left Boston as to how many miles you would have to travel before you got up to your intended destination? A. I don't recall looking it up, specifically.

Q. Do you know approximately what the distance is from Boston to your intended location? A. I do not know the mileage up there.

Q. Which is it, you did have some knowledge of the distance or you did not?

Mr. Mahony: He just said he did not know.

The Witness: I did not know, I do not know the mileage from Boston.

Q. What time did you intend to get to your location? A. The same evening.

Q. What time the same evening? A. I do not know what time I would get there.

Mr. Prendergast: If he can not answer, I am sure I can not; he knows what he intended to do.

The Witness: I said I intended to get there the same evening.

Q. Did you have any thought in mind before you started out, as to what time you would like to get there? A. Not a specific time, sir.

[319] Q. But you intended to get there that evening some time? A. Yes, sir.

Q. Can you tell us whether it is 200 miles from Boston to your intended destination or not? A. I do not know what the mileage is.

Q. Well, you were in an accident? A. Yes, sir.

Q. What time do you say the accident happened? A. Some time between 1:30 and two.

Q. What kind of road were you on before the accident happened? A. We were on a hard surfaced road.

Q. How wide? A. It is a three-lane road.

Q. When you were back, we will say, one-eighth of a mile from where the accident occurred, was it a three-lane road? A. Yes, it was a three-lane road, in that area.

Q. And what part of the road were you operating on? A. I was operating on the right available lane.

Q. There was nothing blocking your progress for the last eighth of a mile back from where this accident happened, as far as the right lane of that highway was concerned, was there?

Mr. Mahony: The extreme right?

Mr. Prendergast: The extreme right lane, his extreme right lane.

Q. Was there? [320] A. There was construction in the extreme right lane.

Q. There was? A. Yes.

Q. One-eighth of a mile back? A. I do not know how far it was back, where the accident occurred there was construction.

Q. I did not say that. I will agree with you there was some sort of construction at where the accident happened. Now let us go back for the one-eighth of a mile, before you come to where the accident happened. Will you tell the Jury whether there was any construction going on in your extreme right lane? A. I do not know what was going on in one-eighth of a mile, I didn't measure the distance, I would not be prepared to make the statement.

Q. A couple of hundred yards back from where the accident happened, tell the Jury whether there was any construction going on that prevented your operating your car

in the extreme right hand lane? A. There was construction in that area.

Q. Two hundred yards back? A. I can not say 200 or some eighth of a mile, in that area, there was construction in the right lane.

Q. Let us see, I want to be as specific as we can. The road is a three-lane road, we have agreed on that, haven't we? A. Yes, sir.

[321] Q. Now you say, do you, that for some distance before you got to the spot where this accident occurred, there was construction going on in the right hand lane which prevented you from operating in that lane, do you want to say that? A. For some distance?

Q. Yes. Now what distance do you want to say that construction was going on? A. I would not be prepared to give that distance because I do not know.

The Court: What is your best estimate?

Mr. Prendergast: I beg your pardon?

The Court: Let him give his best estimate.

Q. Give us your best estimate.

The Court: In feet or yards.

The Witness: In that area along, in that half-mile area, quarter-mile area, along in there, there was construction going on. Now I can not tell you exactly what that distance is. I don't think I should attempt to.

The Court: No; Doctor, you don't have to give it exactly, just your best estimate, you don't have to do it.

The Witness: Well I will say a quarter of a mile.

Q. All right. Now then for a quarter of a mile, as you were proceeding up to the point where this accident occurred, were you able to operate in the right hand lane? A. No.

[322] Q. What lane were you operating in? A. The right available lane.

Q. What lane was that? A. That was the center lane.

Q. So then for some distance before this accident happened you were in the center lane, is that correct? A. Yes, for some distance.

Q. Now tell us, for what distance you say, some distance means? A. As I said a minute ago, I can not tell you the exact distance.

Q. I don't want the exact distance, give us your best estimate. A. I mentioned an approximation of a quarter mile.

Q. Now, will you describe the type of construction going on on this right hand lane for that quarter of a mile? A. I do not know exactly what the men were doing but there was a cable for instance under construction, I believe, there was dirt, materials, equipment and road construction going on. Other than that, I do not know what they were doing.

Q. At some time you got to the top of the hill, didn't you? A. I think there was a grade there, a small grade. I don't think there was any great hill there though.

Q. You were going down a grade at some time before this accident occurred, weren't you? A. There was a grade there, yes.

Q. Do you say that from the top of that grade, down to the bottom of it, to within, we will say 100 feet of the location where this accident happened, there was construction going on [323] in the right hand lane which prevented you from operating your motor vehicle in that lane? A. There was construction in that area where I was operating that vehicle so I could not go in the right lane.

Q. You say then there was construction going on in the right hand lane between the top of the hill and the location where this accident happened, do you say that? A. I do not know exactly where the top of the hill was, but there was construction in that area which prevented me from going in the right lane.

Q. The construction was at the foot of the hill, which

prevented you from being in the right lane, at that point, that is so, isn't it? Isn't it? A. I do not know where, it was a small grade, I am not sure where the top of the hill and the foot of the hill was, I do not know we were exactly at the bottom of the hill.

Q. Do you know whether you were going downgrade or not when the accident occurred? A. I think it was a slight grade there, there wasn't an appreciable hill.

Q. I am not going to quarrel, whether it was appreciable, whether you know the grade of the hill, let us use your description, a grade. Tell the Jury whether you were going down a grade or not, when this accident occurred. A. I think I was. I am not sure.

[324] Q. A grade has a highest point to it? A. I think so.

Q. Do you mind if I call that (indicating) the top of the grade? A. Yes, you may.

Q. Between you and me, we can call it the top of the grade? A. Yes.

Q. Now, from the top of the grade down to where the accident happened, how much distance would you say it was? A. I do not know, sir.

Q. Can't you give the Court and Jury some idea as to the approximate distance? A. I am sorry, I can not.

Q. Can you tell the Jury whether the accident happened up near the top of the grade or down near the bottom of the grade? A. I think it was down toward the bottom of the grade.

Q. Towards the bottom of the grade? A. I am not sure but I think it was.

Q. As you came over the top of the grade, did you drive over this line just the other side, just east of the top of the grade?

Mr. Mahony: Wait a minute, I do not know what you mean by "this line".

Mr. Prendergast: What did he call it, transition line, this is pictured on the board here.

[325] Q. Do you remember driving over that? A. I followed the line of traffic, whatever the signs indicated, where I was supposed to use the traffic available to me.

Q. Go ahead, are you through? A. Yes.

Q. Where were these signs that you speak about? A. There were certain indications.

Q. You talked about signs. Do you now want to call it indications? A. Signs are indications of where you are supposed to drive in the road.

Q. Where were they? A. Whether it be just a construction present or whether a true sign present, there were indications that the line, lane, was not available.

Q. Where were the signs or indications? A. At the beginning of the construction.

Q. Is that east of the top of the grade? A. I do not know exactly where it was, in relation.

Q. I do not know whether you know exactly, can you give us your best opinion, whether or not the first signs as you came along, indicating construction, were east or west, at the top of this grade? A. I can not tell you, sir, because I do not know.

Q. You can not tell us that? [326] A. I cannot tell you. I am not familiar with the appreciable hill in that road, along there.

Q. Aren't you? Could you tell this Jury where the first sign you came upon which indicated to you there was construction on the road was, was it half a mile before you got to the scene of the accident, a quarter of a mile before you got to the scene of the accident or after you got over the top of the grade and started coming down? Could you tell the Jury that much? A. I would be glad to tell the Jury any information that I have but I think you should remember, I was in an accident that day. I mean, you are driving.

along the road, you follow the lines of traffic available to you. You follow the lanes that are available to you and whatever the signs or indications, you take that lane, that is the lane with this—

Q. All I am asking you is, where was this sign? A. I do not know, sir.

Q. What did the sign say? A. The indication was—

Q. What did it say, not the indication, what did it say? A. I do not know that there was a sign there, to read.

Q. You do not know? A. There was an indication, I was to use the center lane.

Mr. Prendergast: May that be stricken out, Your Honor?

The Court: It may.

[327] Q. Will you kindly answer my questions as I put them to you, please? A. Yes.

Q. What did the sign say? A. I tried to tell you that whether it was a specific sign or an indication, that I was to use that place.

Q. What did it indicate, what did the indication indicate, what kind of indication was it? A. There was construction in the right lane, that was the indication, whether it was the sign—

Q. Do you say that part of the right lane was dug up? A. I didn't say it was dug up.

Q. What was the construction going on in this right lane, you are speaking about? A. The right lane is being used for construction.

Q. I didn't ask you that. You have been telling us there was construction. Well, tell the Jury what the construction was, you saw it going on, on the right lane, that day, before you got to the place where this accident happened. A. Well I repeat, the construction was, there was dirt in the right lane, there were materials there for the construction, they

were building a cable fence along there, as I recall at least there seemed to be one under construction there.

Mr. Prendergast: May that "seemed to be one" be stricken out, Your Honor?

[328] The Court: It may.

Q. Did you see any sign that in words which were substantially what I am going to say to you now, which said "Use the middle lane" or "Construction, stay off this lane", anything of that type? A. I don't recall a specific sign that said, in words.

Q. Did you see any signs that were right out in that middle lane, that said "Men working, use the center lane"?

Mr. Mahony: The middle lane?

Mr. Prendergast: The right lane. "Use center lane."

Q. Did you? A. There was no, I don't recall any specific sign that was there, I cannot say truthfully I saw a specific sign but I am sure there were indications I was to use—

Mr. Prendergast: May these added—

The Court: He wants to tell what the indications are.

The Witness: The indication, Your Honor, was the construction and materials that were occupying the right lane.

Q. All right. What was the construction? I will withdraw that for a minute. What was the material that was in the right lane that prevented you from using the right lane? A. At what point?

Q. A quarter of a mile back. In other words, before you got to the top of the grade we are talking about. A. There was dirt in the right lane.

[329] Q. How much dirt. A. There were several piles of dirt along there, probably, that had been dug up from the right side of the road.

Q. Do I understand then there was some digging, going along the right side of the road, off the highway, and dirt had fallen on, or been left on, the highway? Is that what

you want to say? A. I imagine the dirt came from the right side of the highway.

Mr. Prendergast: May his "I imagine" be stricken out, your Honor?

The Witness: What is it you want me to say?

Q. I don't want you to do anything but tell the story and answer my questions. Do you understand me? A. Yes, sir.

Q. It is very simple, it seems to me, for a man of your intelligence. You are a doctor? A. Yes, sir.

Q. College graduate, is that right? A. Yes, sir.

Q. What college? A. Alma College.

Q. Then you went to medical school besides. You certainly are intelligent enough to be able to tell this jury where the digging was, you saw going on, on Route 2, east of the top of the grade there, if there was such.

[330] The Court: A quarter of a mile back.

Mr. Mahony: This witness has not said he saw any digging going on.

The Court: He so indicates.

Mr. Mahony: He saw piles of dirt.

Mr. Prendergast: I have to be careful with my words. Don't we.

Q. Tell this Jury if you will what construction you saw going on, on Route 2, east of the top of the grade, where this construction was, right out on the right hand lane, and which prevented you from operating on the right hand lane. Tell them now, will you? A. I am not—

The Court: He means back a quarter of a mile down.

The Witness: I am not sure what these men were doing. They were working on the road, there was dirt in the right lane, there was equipment there, small tools and that sort of thing, in the right lane. It was obvious they were doing some type of work along the shoulder or along the right side of the road. Specifically what they were doing—

The Court: Was there any wooden horse out there saying "Men working", any sign like that, way back?

The Witness: I can not say that I can remember any specific sign.

The Court: You would remember if it was there?

[331] The Witness: I think I would.

Q. Well then you want to say there wasn't any horse that was right on the first lane that prevented you from driving right along on it? A. There wasn't any, I could not drive in the right lane because there is a—

Q. What? A. The workmanship and materials that were there, from the road construction.

Q. What I would like to get is, was the construction on the shoulder of the road or was it on the lane of the road? A. I believe they were working on the shoulder but I think the materials, some of the dirt was piled up on the right lane, so it could not be used.

Q. Was the whole of the right lane blocked by this dirt that was being dug, apparently from the shoulder of the road, as you describe it? A. Yes.

Q. The whole lane was covered with dirt? A. The whole lane was obstructed for traffic.

Q. The question is, was it covered with dirt? A. There was dirt in the right lane.

Q. The whole of the lane? A. I would not say there was dirt over the whole lane, no, piles of dirt.

[332] Q. Did that dirt, the dirt you described, continue along on the right hand lane for this quarter of a mile you have been describing? A. Yes.

Q. When you came over the top of the grade here, the top of the grade, what lane were you in? A. Previous to the accident.

Q. Will you please stick to the question, when you came over the easterly side of the grade, the top of the grade and started coming down on the grade, what lane were you

operating in? A. I believe at that time I was in the center lane?

Q. All right. Are you sure you were in the center lane? A. I do not know exactly the distance back, when we took the center lane.

Q. I am not talking about the distance back, I am asking you a simple question, Doctor, when you got over the top of the grade here, are you sure you were in the center lane? A. No, I am not sure.

Q. Are you sure that the lane at the top of the grade here on the right hand side of the street was blocked? A. No, I am not sure.

Q. You are not sure of that. Are you sure there were any signs on the right hand lane here at the top of the grade? A. No, I am not.

[333] Q. Well now you do remember, don't you, that there were signs down here, at the bottom of the grade, one of which said "Slow", you remember that? A. What the sign may have been?

Q. Don't you remember seeing it? A. No, I don't.

Q. Do you say there was any construction between the top of the grade here and the bottom of the hill, that is up to within 100 feet of the bottom of the hill which prevented you from operating in the right hand lane? A. There was some, again I can not, I do not know the exact distance that construction, that lane was blocked.

Q. Well apparently, from what the engineer or the Department of Public Works said, it is 1,015 feet to the top of the grade, from the top of the grade down to the Concord-Acton line. Excuse me, I am corrected, from the top of the grade here to the bottom of the hill, or, in other words the Acton line, is 720 feet. Do you know how close to the Acton line the accident occurred? A. No, sir.

Q. Have you any idea how close you were to the Acton line? A. I do not know where the Acton line is, sir.

Q. Let us assume, it is within 100 feet, that would still leave you 600 feet from where the accident happened, back to the top of the grade. Do you follow me now? [334] A. Yes.

Q. At some time before you got to the point where the accident happened, you had got into the middle lane or partly into the middle lane, didn't you? A. I think so.

Q. Now, what I want to know is, from the top of the hill, the top of the grade down to the location where the construction was going on, at the bottom of the grade, do you say there was any construction in that 400 or 500 feet there, on that right hand lane, that prevented you from driving your car in that lane? A. Yes, there was construction there, that prevented it.

Q. Do you say there was construction on the right hand lane at the top of the grade? A. I think there was, I am not sure.

Q. You are not sure? A. I am not sure of the distances.

Q. Do you think there was construction?

The Court: He said he is not sure of the distances.

Mr. Prendergast: He is not sure.

Q. I am talking about the top of the grade. A. I know you are. I am not sure about the position of the top of the grade in relation to the position of the accident, sir.

Q. You know what 200 yards are? A. Yes, sir.

[335] Q. You know what the length of a football field is? A. Yes, sir.

Q. Now double that, is 200, isn't it? A. Yes.

Q. When you were that distance back from where this accident happened, do you say there was construction on the right hand lane, all the way from that point up to where the bottom of the grade is, which prevented you from operating in that right-hand lane? A. I think there was construction along that.

Q. The whole distance now? A. I think so.

Q. Don't you know? A. No, I do not.

Q. Don't you know where you were when you first saw construction going on, on that highway? A. A few yards before the accident.

Q. A few yards; all right.

The Court: A few hundred yards he said?

Q. Was it a few yards?

The Court: A few hundred, was that what you said?

Mr. Prendergast: May we have it read?

(The answer of the witness is read.)

Q. Well now what do you mean by a few yards?

The Court: I tell you, Doctor, would you mind if I [336] suggested something, would you please speak up so that counsel can hear?

Q. What do you mean now by a few yards? A. Fifty, 100 yards.

Q. Well, isn't it a fact then, as far as you are concerned, that the first time you saw any signs of any construction going on, on Route 2, on the right hand side of the highway, was when you were within 200 yards of where this accident happened? A. I think that is about correct.

Mr. Mahony: Two hundred?

Mr. Prendergast: I will repeat it.

Q. Isn't it a fact—

Mr. Mahony: May we have the answer?

(The question and answer are read.)

Q. Now what do you mean by a few yards? A. Fifty or 100 yards.

Q. Then up to the time that you were within 50 or 100 yards of where this construction was going on, you were operating in the right hand side of the road, weren't you? A. Yes, sir.

Q. You were over on the right hand lane, weren't you? A. Yes, sir.

Q. Now isn't it a fact that if the top of the grade is

f om the bottom, 720 feet, you actually came over the top of the [337] grade in the right hand lane, didn't you? A. If those figures are correct.

Q. They are your figures. A. Those are my figures?

Mr. Prendergast: Let me cross-examine, don't try to lay an egg. He understands me. If he does not, he can say so.

Mr. Mahony: I submit Mr. Buzzell is perfectly, properly within his rights.

The Court: I did not hear Mr. Buzzell make any—

Mr. Mahony: I submit the comment is totally improper.

Mr. Prendergast: May he be chastised?

The Court: I think, Mr. Buzzell, if he is making an objection, should stand up and say so. I think I agree with you, Mr. Mahony, both remarks, Mr. Buzzell as well as Mr. Prendergast, without any reflection on either one of them, should be stricken out.

Have you been out to the scene of the accident at all?

The Witness: No, sir.

The Court: You have not seen it since this accident?

The Witness: No, sir. I casually drove by a couple of weeks later and could not identify very much, and that was all.

Q. At any rate, when you did say that there was construction in the highway going on ahead of you, you were in the right hand lane, weren't you? A. Yes.

[338] The Court: Have you been here since the beginning of the trial?

The Witness: Yes.

Q. Now, seeing that the construction was ahead of you, you also saw there was some—what do you call them, horses.

(Discussion off the record.)

Q. They are wooden horses out in the right hand lane. That is what you saw? A. I think so.

Q. You saw a sign which said "Men working", didn't you? A. Yes. I am not, I don't remember specifically the wording on the sign.

Q. Then you saw, I think they call them gasoline lamps, the sort of round black objects, you can light up, a flame comes from them, you saw one or two of those on the highway, didn't you? A. There may have been some, I don't remember.

Q. And when you saw the construction ahead of you, you turned from the right hand lane in the direction of the middle lane, didn't you? A. Yes.

Q. So there isn't any doubt now, is there, Mr. Witness, that some place between the top of the grade and the place where this accident happened, you turned from the right hand lane over into the direction, in a southerly direction, there isn't any doubt about that now, is there? [339] A. No, sir.

Q. Did you see the plaintiff's truck before or after you made the turn to the south?

The Court: Let the witness get that question again.

(The question is read:)

A. I think I was traveling in the center lane when I saw the truck.

Q. So that you did not see the plaintiff's truck until you got into the center lane? A. I don't recall seeing it.

Q. Until you got into the center lane. Now tell the Court and Jury how fast you were traveling when you came over the top of the grade.

The Court: Now what do you mean, way back, the top of the grade?

Mr. Prendergast: The top of the grade is within 750 feet.

The Court: He means 750 feet back, Doctor.

The Witness: Probably about 25, between 25 and 30 miles an hour.

Q. How fast were you traveling when you were half a mile back from where the accident happened? A. Oh about 30, 35 perhaps.

Q. Perhaps? A. We were not traveling awfully fast because it was a new [340] road to us, we were not sure we were on the right road.

Q. You were not even sure you were on the right road? A. In the direction we were planning to go.

Q. Hadn't you already gone over your route? A. Yes, sir.

Q. The map. Didn't you know what route you were going to take, to where you were going? A. Yes, sir.

Q. You knew you were on the right road then? A. No, sir.

Q. You knew you were going to take Route 2? A. Yes, sir.

Q. You knew, there were a lot of signs along there, you were on Route 2? A. Well no, there wasn't. It was a new road and we were looking carefully to see if were on the right road.

Q. So you— A. I think, if I recall, there is a cutoff road around Concord.

Q. That road had not been built at that time, that new Route 2 wasn't built in 1952, was it? A. This road goes a little around Concord, doesn't it?

Q. When you get into Concord you make a turn around the circle near the Concord Reformatory, you shoot straight right along, you are on a perfectly straight road, it was Route 2 at the time. A. Well as I say, we were not quite sure of our road, we were [341] driving slowly because of that.

Q. You had left Boston at some time after 12 o'clock, you had gone out into Howard Johnson's and had lunch and left there some time between one and 1:30, and then you were on the way, way up to this Vermont location, you

were only going 25-30 miles, is that the way you want to leave it? A. Yes, sir.

Q. Was your car in good condition? A. Yes, sir.

Q. Brakes in good condition? A. Yes, sir.

Q. The weather good? A. Yes, sir.

Q. The roads were dry? A. Yes, sir.

Q. Do you say now at the time you first saw this plaintiff's truck, you were going between 25 and 30 miles an hour? A. I would judge about that, yes.

Q. Traveling along at that speed, 25-30 miles an hour with the brakes you had that day and faced with the conditions you were faced with that day, how quickly could you bring your car to a stop, that is, within what distance? A. Well, I think, in a very few feet.

Q. A very few feet, it may mean four to five, it may mean 25, we want to Jury to know what you mean by a very few feet. [342] A. I think I could stop it within 15, 20 feet.

Q. Now when you first saw the defendant's vehicle, how close to the construction were you? A. You mean construction on my right, or approaching?

Q. Was there construction there on your right when you first saw the defendant's vehicle? A. Yes.

Q. There was? A. That is what I—yes.

Q. Are you sure of that, Doctor? A. Yes.

Q. Why, the accident happened on the easterly side of the construction, didn't it, that is before your had even got to the construction. Didn't it? A. Well, there was construction at the site of the accident.

Q. There was construction just ahead of where the accident happened, wasn't there? A. Yes.

Q. There was no construction right in, right where the accident happened, was there? A. There was some work going on right along there.

Q. There was no work going on or work which in any way was blocking the right hand lane, as your were pro-

ceeding for a distance of at least 200 feet back in an easterly direction from where the accident happened, was there? Right in along there (indicating). [343] A. There was construction at the site of the accident, sir.

Q. There was construction. Do you say then that the accident happened right where the construction was going on? A. Right along in that area.

Q. Well now "in that area" means many things. A. At the site of the accident, there was construction.

Q. How close to the construction were you when the accident occurred? A. The construction is right there, in the right lane.

Q. Were you going by the construction? A. Yes.

Q. You were going by it? A. Yes.

Q. All right. You don't want to change that testimony, you were going right by the construction when the accident happened? A. No, sir.

Q. Now what was this construction that you saw? A. Well, it was then, there were men working there along, there was dirt piled up and construction materials in the right lane, apparently there was some work going on, over on the right shoulder.

Q. What I want to know, Doctor, was the construction going on where this accident occurred, in the right lane? A. Yes.

Q. Was the construction actually in the lane, the right hand [344] lane, that is the northerly lane? A. I do not know that the construction was there but there were materials and that sort of thing there, going on, associated with road construction, that blocked that lane.

Q. Doctor, you were driving a car on Route 2 that day, no doubt about that, is there? A. That is right.

Q. You came along and you saw some signs that indicated to you that men were working in that highway, didn't you? A. That is right.

Q. Well then, seeing the sign, that indicated to you that men were working, weren't you watching out to see what these men were doing so that you caused no bother to them and no trouble? A. All I had noticed was that those men were working and building roads over to the side, I was cautious so that I didn't bother them.

Q. Building roads into the side? A. Working on road construction.

Q. Where this accident happened, there were two canals or channels being built, partway across Route 2 on the right hand lane, weren't there? In other words, I will put this in temporarily and erase it (indicating, on the blackboard), something in that nature, they were being dug out, around there? A. I do not know.

[345] Q. You do not know. Yet you were driving along that day and knew men were working right there on that lane and you do not know what kind of work they were doing? A. They were digging up some dirt, there was some dirt in the lane.

Q. All right. Do you say you were going, you were in the third lane or partly in the third lane, the day this accident happened? A. I was in the center lane, the right available lane.

Q. Do you say you were going past these two spots here? A. I was going past some construction there.

Q. Now do you know where your car was after the accident was over? A. It was over in the right lane, off the shoulder.

Q. It was up here, wasn't it? A. Yes, sir.

Q. There isn't any doubt about that, is there? A. Well it was over into the right lane.

Q. It had not got up to where the construction was going on, had it? A. There was construction right along in there.

Q. Doctor, when you saw your car after the accident was over, was it beside the dirt that was dug out, was it west

of the dirt that was dug out, or was it east of the dirt that was dug out? [346] A. Sir, I do not know exactly how it was in relation to the dirt, but there was some dirt out in that lane.

Q. When you pulled over on to the middle lane, did you see the truck? A. I was in the middle lane when I saw the truck.

Q. I am asking you a simple question, when you pulled over from the right lane into the center lane, did you see the truck? A. At the time I pulled over, I don't recall, but it was after I was in the middle lane I saw the truck.

Q. You did not see the truck until you were in the middle lane, is that right? A. I don't think so.

Q. Don't you know? A. It is a question of distance, sir, I am not sure.

Q. It is a question of observation, isn't it? A. Yes, sir.

Q. Can't you tell this Jury whether or not you saw this truck at the time you pulled into the middle lane? A. Sir, I believe I was in the middle lane when I saw the truck first.

Q. But you didn't see it when you pulled into the middle lane, is that so? A. I think that is correct.

Q. You had not seen it up until, for some time after you had got into the middle lane, is that so? [347] A. I think that is correct.

Q. Did you see the truck when you were coming over the top of the grade? A. I am not sure, the distance, at the top of the grade is 650, you say?

Q. 720. A. I believe it was about, I would judge it was about 50 or 100 yards. The truck was about that far away when I first saw it.

Q. Where were you when you first saw it? A. I believe I was in the middle lane, in the right available lane.

Q. When you came over the brow, the top of the grade

here, you had a perfectly straight view ahead of you? A. Yes.

Q. There was nothing to block your vision? A. No, sir.

Q. Nothing to interfere with your observing traffic in the highway ahead of you? A. No, sir.

Q. There was no traffic going in the direction you were going, was there? A. No, sir.

Q. You could see a distance of at least 1,000 feet ahead, couldn't you? [348] A. Yes.

Q. In that 1,000 feet, did you see any traffic coming towards you? A. Well, at a distance of about 50 or 100 yards I saw this truck.

Q. I am asking a simple question, when you were 1,000 feet, when you came over the brow of the hill, you could see 1,000 feet ahead. Now I ask you if at that time you saw any traffic coming towards you? A. I don't recall seeing any traffic.

Q. You don't recall. You say the first time you saw the truck, he was about how many yards away from you? A. I would judge about 50 or 100.

Q. 50 or 100. Could you come closer than that? A. No, I don't believe I can.

Q. You then say you were traveling 25, 30 miles an hour? A. Yes, sir.

Q. How close to the construction were you at that time? A. Well, I was driving in the center lane and the construction was to my right.

Q. How close to it were you, were you 10 feet from it or 15 feet or 30 feet from it, or what? A. We were traveling in the immediate middle lane, in the right lane, I understand, was 10 feet wide, we were right just a few feet, just over in the center lane.

[349] Q. You indicate, you want to indicate that the complete 10 feet of the right hand lane was taken up by construction; is that the way you want to leave it? A. Yes, sir.

Q. Well where was the truck when you first saw it? A. It was about 50 or 100 yards distance, ahead.

Q. Where was he in the highway? A. He was on my left.

Q. On your left? A. Yes.

Q. Well now was any part of his car in front of you? A. Not at that time.

Q. So now then, we have the picture of your proceeding in the middle lane, and no other car in the middle lane, ahead of you, is that correct? A. That is right.

Q. How fast—withdraw that—how far did you see the truck travel, that is, how far did you watch the truck travel? A. I have watched him travel until he approached this.

Q. So that it is 50 or 100 yards that you kept your eye on the truck, is that right? A. Yes.

Q. You paid no attention to any canals that may have been there on the highway on your right or right in front of you? A. Yes, I did.

[359] Q. You did not keep watching the truck, did you? A. I was watching the whole road, sir.

Q. Now you saw the truck coming towards you? A. Yes, sir.

Q. And you were going towards the truck, is that right? A. I was going down the road, in the middle lane.

Q. In the general direction of the truck, he is coming in the general direction of you? A. That is right.

Q. You are in your lane? A. Yes, sir.

Q. You say the middle lane? A. Yes, sir.

Q. He was over on the right hand side of the road, is that right? A. Yes, sir.

Q. Was there anything between you and the truck? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. Was there anything in the right, on the truck's lane, now mind you I am talking about the truck's lane, which on the board there would be the southerly lane, you under-

stand, I don't want to mislead you, was there anything on that southerly lane in front of the truck? [351] A. No, sir.

Q. Between the spot where you were and the spot where the truck was? A. No, sir.

Q. Nothing; was there any digging going on in that lane? A. In the left lane?

Q. No, the southerly lane. Now that is the left lane as you were going, the extreme left lane, as you were proceeding? A. I don't think so.

Q. Did you see anything? A. No; no digging.

Q. Did you see anything in that southerly lane which, in your judgment would cause that truck to turn to the left into the middle lane? A. No.

Q. From the time you first saw it until the time the accident happened? A. No, sir

Q. No. All right. You were traveling 25, 30 miles an hour? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. The truck is coming towards you, at what speed, in your judgment? A. Well I was going right along, I think he was probably going [352] between 40 and 50.

Q. Well then it did not take five seconds before the cars got up to each other, did it? A. It did not take very long.

Q. Well all right. You kept going in the straight line, did you? A. Yes, sir.

Q. And going 25 miles an hour do you know how far you were traveling in one second, how many feet you travel in one second? A. No. I would have to figure that out.

Q. Suppose I tell you you travel about 37 feet in a second, do you know a car going 50 miles an hour would travel about 75 feet in a second? A. Yes.

Q. On that basis of 75 and 35, that would be 110 feet, right? Both of you together, both vehicles were covering 110 feet in one second, right? A. That is right.

Q. Your car came in contact with the truck, didn't it? A. Yes, sir.

Q. And the truck came in contact with your car? A. That is right.

Q. What part of the truck did your car come in contact with? A. The truck's right bumper hit my right front bumper and wheel, my left front bumper and wheel.

[353] Q. The truck's what? A. The truck's right.

Q. Right front bumper? A. That is right.

Q. Hit what? A. Hit my left front bumper and wheel.

Q. Well after you saw the truck, for the first time, it continued in an easterly direction for some period, before it came in contact with your car, didn't it? A. Yes.

Q. And after you saw the truck, for the first time, you continued in a westerly direction for some distance before the accident occurred? A. Yes, again—

Q. Now you tell this Jury here, the first time you saw this truck, it was 50 to 100 yards ahead of you, don't you? A. Yes, sir, approximately, I think.

Q. Do you remember talking to the police? A. Yes.

Q. You were conscious at the scene of the accident, weren't you? A. Yes.

Q. And you knew what was going on around there after the accident was over? A. Yes.

[354] Q. You had no concussions of any kind, no marks on your face of any kind, did you? A. No.

Q. You talked to the police at the hospital, didn't you? A. Yes, sir.

Q. Do you remember telling them this, I was traveling west on Route 2, at an estimated speed of 30 miles an hour. The first thing I saw was a truck coming for my car. It seemed to be coming at an angle and on my part of the road. I applied my brakes and then he hit me. There was no place for me to turn, or time in which to do so.

That is, those are the facts that you gave the police in

Concord on the day this accident happened, weren't they? A. Yes.

Q. You never told the police at any time that you first saw the truck 50 to 100 yards ahead of you, did you? A. Apparently I did not, in that statement.

Q. In this statement, did you make out any other reports? A. No, sir.

Q. What? A. No, sir.

Q. Did you make out any other statements? A. No, sir.

Q. Are you sure? A. Except to my counsel.

[355] Q. Did you make out any statements to anybody else? A. Not that I recall.

Q. When did you make out your statements to your counsel? A. Well, that was after the accident.

Q. Answer this Yes or No, so there will be no trouble: Did you authorize your counsel to make any statements for you to anybody else? Please say Yes or No to that. A. My counsel is authorized to say anything they wish.

Q. Which counsel are you talking about? You have two. A. Both of them.

Q. You did give a statement? Did you give a statement directly to Mr. Mahony? A. Mr. Mahony's office.

Q. Are you sure it was Mr. Mahony's office or Mr. Mahony's client, which? A. Mr. Mahony's office.

Q. When did you first give a statement to Mr. Mahony's office? A. Oh well, that was in September or October.

Q. Five or six months after the accident? A. Some time after.

Q. Three months after the accident? Two months? Wasn't there some other counsel in this case for you before Mr. Mahony came in? I mean, as defendant; put it that way, be specific. A. The three gentlemen back there, Mr. Ewing.

Q. Mr. Lobdell's appearance, is that in? It isn't there. [356] The Clerk: I don't see it here.

Mr. Prendergast: We can agree, can't we, Mr. Mahony, and Mr. Lobdell of another office?

Mr. Mahony: Took their deposition? I am not sure an appearance was filed.

Mr. Prendergast: He represented the defendant.

Mr. Mahony: On the deposition.

Mr. Prendergast: He is not from your office?

Mr. Mahony: No.

Mr. Prendergast: All right.

[357] The Court: You mean there was a deposition taken in this case without an appearance of an attorney being filed?

Mr. Prendergast: I do not know, Your Honor. Apparently Mr. Lobdell has not filed any appearance that I know of.

Mr. Mahony: It may have been Mr. Sears' appearance that was filed.

The Court: Is Mr. Sears appearing—

Mr. Prendergast: Do you mind telling us, Mr. Mahony, when you first came into this case?

Mr. Mahony: I don't remember when any appearance was filed.

The Court: It bothers me. When a deposition is taken, it is a rule of court, an appearance must be entered. Certainly I never knew it until now. Don't misunderstand me, Mr. Mahony.

Mr. Mahony: I don't think Mr. Mahony's status is a fact, but I am in now.

Mr. Prendergast: You are in, up to your neck.

The Court: You must disregard comments. They are made in a spirit of fun. We want to judge the case on the testimony.

I think it is agreed Mr. Lobdell is a very fine lawyer, and responsible.

Mr. Prendergast: Yes.

The Court: No one questions that. Is it agreed he [358] took the deposition?

Mr. Prendergast: Yes.

The Court: On behalf of someone of the defendants, in behalf of some defendant?

Mr. Prendergast: He appeared for Doctor Hobart. Let us put it that way, in the deposition.

The Court: Is it agreed?

Mr. Mahony: Yes. Apparently in the deposition, the appearance for the defendant was Brickley, Sears & Cole, by Joseph W. Lobdell.

Q. Now you said it was the left side of the truck—

The Court: That is a very responsible firm of lawyers.

Mr. Prendergast: Withdraw that.

The Court: Just the same as the attorneys that are here.

Q. Last one question, Doctor, you said it was the right side of the truck which was in contact with the left side of your car, didn't you? A. Yes.

Q. You don't want to change that now, do you? A. No, sir.

Q. That is your testimony, you want to leave your testimony as being that in so far as it relates to the parts of the vehicles that came together? [359] A. The left front.

Q. Of your car? A. The left front.

Q. Of your car? A. Of my car, came in contact with the right front of his car.

Q. Now, so there will be no question at all, will you tell us what you call the right front of the truck? A. The front of the right wheel.

Q. All right. A. Over the right end of the bumper, it is the right side of the car.

Q. You mean it is the side away from the driver? A. That is right.

Mr. Prendergast: You want that, that is definite.

Thank you very much, that is all.

Mr. Mahony: We will postpone our examination of Mr. Hobart.

The Court: That is perfectly all right.

Mr. Prendergast: I thought my friend would be able to get the hospital record. Do you want to take an early recess, and then we will do it?

The Court: That appearance wasn't entered. Mistakes are always made, none of us is perfect.

(Discussion off the record.)

The Court: I understand you waive any examination [360] on it?

Mr. Mahony: As far as cross examination.

Mr. Prendergast: What do you mean, cross examination, it would be direct.

The Court: You waive any examination now. The doctor will take the witness stand again, if counsel feel, he will take it, you will have the right to cross examine.

Mr. Prendergast: All right.

The Court: We will take a few minutes.

(A short recess.)

GRACE R. FRASER, Sworn

Direct Examination by Mr. Prendergast

Q. Give your name. A. Grace R. Fraser.

Q. You are from the Saugus General Hospital? A. The Saugus General Hospital.

Q. Give me these bedside notes. This is the first visit now? A. Yes.

Q. Give me the bedside notes. A. June the 21st.

Q. Give them to me, will you? A. Yes.

Q. That is it. These are all bedside notes, are they? A. Yes.

Q. Will you read the rest of the record?

[361] The Court: Is there anything counsel would want me to add, to what I have said? There isn't any objection to anything I have said?

Mr. Mahony: I have none, Your Honor.

The Witness: This is the Progress Notes of Mr. O'Brien. On June 22d, patient in severe pain. June 23d, patient in severe pain. This is written by Doctor Baskies.

June 24th. Doctor Farrand called to examine and treat chest. Clytheostal-nerve block with 1 per cent Procaine to reduce pain of fractured ribs.

June 27th. Still has pain in chest with rales in chest bi-lateral. Coughing blood of sputum.

June 28th. Ecchymotic area still present. Pain in chest controlled by medication. Coughing blood of sputum.

June 29th. Hernia out. Bothers patient.

July 1st. Pain in left chest. Coughing.

July 2nd. No breath sounds in left base of lungs.

July 3d. Fluid or blood in left base. No breath sounds.

July 4th. Patient very uncomfortable. Resp. 30 min. Pain in chest and left apex: Pain over hernia—out.

July 6th. Some pain in left chest base.

July 7th. Slight improvement.

July 14th. Pain still in chest and left hand.

July 15th. Improving.

[362] July 26th. Condition improving. Patient discharged ambulatory to return for herniography. B. Baskies, M.D.

Now, I have—

Q. Go ahead. A. —the consultation of Doctor Cotta, in July, it was typed up July 9, 1952.

Consultation, Michael P. O'Brien. Age 69. Admitted June 21, 1952. Doctor Cotta for Doctor Baskies.

"Patient states that he was in automobile accident 6/21/52 and sustained multiple contusions and fractures of the 5th, 6th, 7th and 8th ribs and noticed a swelling in the left groin. Patient states that he never

had a swelling of the left groin of any kind and that the swelling in the groin appeared immediately after the accident.

"Physical examination discloses a well developed, slightly undernourished male, with respiratory difficulty. There is a mass in the left inguinal region, the size of a small orange which is reducible, but no attempt was made to make the patient cough because of pain in the chest.

"Conclusion: This man has multiple contusions and fractures of the ribs as stated above. A traumatic left inguinal hernia.

G. J. Cotta, M.D., Chief-of-Staff."

[363] These are the X-ray reports, Saugus General Hospital.

Mr. Prendergast: I think those were read.

The Witness: Yes, those were all taken care of in the viewing machine. I read this yesterday, on the stand.

Mr. Prendergast: All right.

The Witness: This is by Doctor Farrand.

Mr. Prendergast: Read it.

The Witness: June 24, 1952.

"The history, physical are reviewed and the patient examined.

"This 69 year old white male truck driver was in an automobile accident on the Concord Pike three days ago. He received emergency treatment at the Emerson Hospital and released. Because of persistent pain in left chest, cough and hemoptyses he called his physician and was then admitted to the Saugus Hospital.

"On P.E. he appears alert and comfortable—complains of pain on deep respiratory motions. He has a tight binder that decreases respiratory excursions.

There is no *paradox*. There is tenderness along course of ribs 5, 6, 7th in midaxillary line.

"His chest has coarse moist bronchi bilat. There is no dullness or demonstrable fluid.

[364] "Heart sounds normal. TPR normal.

"(X-rays are not available for review now. He is said to have fractured ribs on left.)

Impression:

1) Multiple contusions and abrasion.
2) Multiple fractured ribs on the left of a 'flail' or 'stove in' chest.
3) Traumatic pneumonitis. Patchy atelectasis and retention of bronchial secretions 2° to splinting of chest—left—from pain.
4) No edema on PE of—thorax or effusion.

Suggestion:

1) Continue on antibiotics.
2) Intercostal nerve block with 1% procaine and efocaine to reduce pain from fractured ribs.
3) Avoid tight binders. Proper nerve block will permit cough and evacuation of retained secretions by reducing pain.
4) Benglin Expectorant 1 oz. t.i.d.
5) Repeat X-ray of chest in 3 days.
6) Bronchoscopy with lavage if patient unable to raise secretions.

Intercostal nerve block performed and binder removed. I would like to see x-rays on this patient. If they are available I will review them tomorrow morning.

R. E. Farrand, M.D.
314 Commonwealth Ave.
Boston."

"July 3, 1952.

"Patient is reviewed again and x-rays seen. He has been feeling well except for some discomfort [365] in left anterior chest. No cough, pleurisy, chills or fever. He is ambulatory and chemically better.

"There is dullness at left base. X-ray shows a considerable effusion in left chest as a result of his initial traumatic episode.

"*Suggest:* 1) Thorocenteses with repeated instillation of antibiotics following asperation of diffusion (which will probably be sanguine). It is necessary to maintain a dry chest to prevent an empyema, clotted hemothorax and a 'fused chest'.

2) If he develops a clotted hemothorax we can employ streptokenase and streptodornase intrapleurally.

"Thorocenteses performed—2900cc bloody fluid removed and 1 M units penicillin instilled. I will tap again on Saturday a.m.

R. E. Farrand, M.D.

July 5, 1952.

"Thorocenteses—640 cc bloody fluid removed and 1 M units penicillin instilled.

"To have chest x-ray and probable repeat tap on Monday.

R. E. Farrand, M.D.

[366] July 7, 1952.

"X-rays show considerable amount of pleural effusion. Thorocenteses performed—600 cc bloody fluid obtained. Will tap again on Wednesday. We can check after that with repeat x-ray. I believe we are making considerable progress in this hemothorax.

R.E.F.

July 11, 1952.

"There is blounting of costophrenic angle with slight amount of fluid and, or thickened pleuria at left base."

"I believe patient is doing well and does not need a repeat thoroccuteses at this time.

R.E.F."

Sir, the other laboratory—

Mr. Prendergast: All right, read that.

The Witness: "Tubercle bacilli were not found in the sputum from Michael O'Brien after 8 weeks' cultivation."

This is ju[illegible] the blood and urine:

(The witness read the blood and urine reports from June 23d to July 17th.)

The Witness: That is all on that, that is his admission. [367] Q. Will you kindly take these day sheets and go through, showing us the medicines and drugs given to him.

Mr. Mahony: Give the dates.

Mr. Prendergast: You gave them up to the 24th?

The Witness: Yes.

Mr. Prendergast: I think she read up to the 24th yesterday. Begin with the 24th, on the medicines.

(The witness read the medicines which were administered, ending with July 26th.)

Q. Take the second entry, will you please? A. He was readmitted.

Q. Take the X-rays out, those have been read, and read the others, just read the narcotics, the medicine, when you get to the day. A. This was the second admission, in January, 1953. January 4th, he was admitted. At 10 o'clock that evening he was given—

Mr. Mahony: Is this medication, beginning January 4, 1953?

The Witness: Second hour, for sleep.

(The witness read the medicines given, to March 6th.)

The Witness: Between 12 and 1, he was discharged.

Mr. Mahony: He was discharged on the 6th?

The Witness: March 6th.

Mr. Prendergast: Those are the day-sheets?

The Witness: Yes. These are the X-rays, the operation.

[368] Q. What is this? A. That is June. This is January.

Q. That is June, this is January, all right. So you have read the records completely then. A. Did I read the operations?

Q. Have you got the operation sheet? A. There are two operations.

The Court: What I think I will do is, be back at 2 o'clock; let you get a jump ahead of the 1 o'clock traffic, I think it is better to do it.

Mr. Prendergast: May I interrupt and ask you something? It might be for the convenience of everybody, me in particular.

I just found out my doctor, I expected in here, has just been faced with two emergency operations and cannot get here. I find likewise I have another witness who cannot be here today.

Now since the case must go on Tuesday, since the only other witness I have is the young lady that will read the Massachusetts Memorial Hospitals record, which won't be too long, I thought it might be for the convenience of everybody if you ran over a little while and adjourned for the day. You would accommodate me by doing that. Everybody could be free for the afternoon. I don't think I would go until 20 minutes past one.

[369] The Court: What I better do is, have the Jury go along and then come back at 2 o'clock. Don't you think it better?

Mr. Mahony: Do I understand your suggestion?—

The Court: What would the Jury like to do?

A Juror: For a difference of 20 minutes, might as well wade through.

Mr. Prendergast: Just her.

The Court: The hospital reports?

Mr. Prendergast: Read the hospital reports, finish this, and put on the Massachusetts Memorial Hospital—

Mr. Mahony: I think I read it yesterday.

Mr. Prendergast: There may be one or two things.

Mr. Mahony: Are you suggesting to adjourn until Tuesday?

(Discussion off the record.)

Mr. Prendergast: Finish those papers.

The Witness: Just the operation, January 12, he was given potocaine spinal anesthesia, a 4-inch incision—

Mr. Mahony: You went through that with Doctor Golden.

The Witness: Did he read that?

Mr. Mahony: Yes.

Mr. Prendergast: That was read by Doctor Golden. It is only short.

The Court: Go ahead.

[370] Mr. Prendergast: It is very short.

The Witness: "A 4-inch incision over left inguinal ligament beginning at pelvic tubercle—aponeurosis of ext. oblique incised exposing inguinal canal. Hernial sac medial to cord was exposed and freed by blunt dissection. A purse string placed at neck, tied and sac removed. Falx aponeurotica inguinalis sutured inguinal ligament with interrupted chromic #2 sutures medial to the cord and one suture lateral to cord. Aponeurosis of external oblique sutured lateral to cord with continuous suture of catgut #1. Skin closed with clips."

This is on February 4:

"Old incision reopened over left inguinal canal-fossa ovalis and femoral triangle were exposed and a sac was freed by sharp and blunt dissection running up through femoral canal up to abdomen. Neck closed

with purse-string suture—sac was removed. Stump was transposed—aponeurosis of ext. oblique and inguinal ligament sutured with #2 catgut to pectineus muscle obliterating femoral canal. Skin closed with clips."

That completes those.

[371] Mr. Prendergast: All right. We are through. Do you wish anything, Mr. Mahony? (No response.) Will you step down.

Mrs. Dorothy M. Josselyn, Sworn

Direct Examination by Mr. Prendergast

Q. Your name is what? A. Mrs. Dorothy M. Josselyn.

Q. You live where? A. 110 O'Callahan Way.

Q. You are connected with the Massachusetts Memorial Hospital and you have brought in the record of that hospital with relation to Michael O'Brien. Is that right? Now, did you bring in the bill of the hospital? A. Yes.

Q. How much was the bill? A. A total amount, while he was in in-patient, $943.05.

Mr. Mahony: Massachusetts Memorial. Didn't I understand the doctor to say there was no bill?

Mr. Prendergast: That is for him.

The Witness: That is the outpatient clinic.

Q. Will you repeat it? A. $943.05.

Q. Will you kindly give us, up to what date? A. Up to April 2d, 1953.

Q. April 2d, 1953. You don't need to read this sheet here. [372] the discharge note; Mr. Mahony read it. You don't need to read the temperature charts and the bedside notes, if any. Will you kindly read the other notes?

The Court: Could I have your address?

The Witness: 110 O'Callahan Way, South Boston.

This is the record of Michael P. O'Brien. He was on

thoracic service, March 9, 1953. This is dictated by Doctor Merrill.

(The witness read the report of Doctor Merrill.)

The Witness: This is March 19th, the same service. This is Doctor Sutter and Doctor Merrill, operating; Doctor Moran and Doctor Baker, assistants. This was dictated by Doctor Merrill.

(The witness read the report.)

Q. Is there a charge here for a blood transfusion (pointing)? All right, the charge is in there. This is what? A. Pathology.

Mr. Mahony: I think I read that yesterday.

Mr. Prendergast: Pathology?

Mr. Mahony: While Doctor Sutter was on the stand.

Mr. Prendergast: Go along.

The Witness: This is the surgical dictation by Doctor Johnston. This is Michael O'Brien, thoracic service, Doctor Johnston, operator.

(The witness read the report.)

[373] Q. The date of that? A. March 21st.

Mr. Mahony: May I get that again; the diagnosis, probably pulmonary?

The Witness: Yes.

Mr. Mahony: March 21, 1953.

Q. What is that sheet? A. This is the admission history, that has been read.

Q. What is this? A. This is medical.

Q. It is in the other notes. What are these, medicine, physicians' orders? A. Physicians' orders.

Q. Day sheets? A. Laboratory reports and X-rays. Those were covered by Doctor Burke.

Mr. Prendergast: Well, Judge, I think 4 o'clock has come.

The Court: If in your deliberations you feel you want to have any of these hospital reports read to you, or re-

read to you, any part of it, I am perfectly willing you should, if you want to take them. I would like to have these hospital reports remain here.

Mr. Prendergast: We will have them back every day.

The Court: Turn them over to the Clerk; I will see [374] they are preserved. Counsel may have them. We will give you a receipt for these hospital reports. We know how important they are to the hospital. The Clerk will give you a receipt for the records. Then they will be available, they will be in the custody of the Clerk of this Court. Don't worry about them. They will be returned to you, just as we like to have this flag always unsullied.

I am going to let you go. I am going to suggest to you that you have a nice week-end, just have a lot of relaxation and try to remember, don't talk or discuss it with anybody, the family or anybody. God willing, I will see you Tuesday morning at 10 o'clock.

Could I see counsel at the bench a minute?

(Counsel at the bench, off the record.)

(Adjourned to December 6, 1955.)

[379] The Witness: This is dictated by Dr. Keith Merrill. Preoperative diagnosis: As above. Question of Carcinoma, right lung. Bronchoscopy, is the operation. Under excellent topical anesthesia with 2 per cent and 0.2 per cent pontocaine, the 8-40 bronchoscope was passed. Examination revealed no abnormality of the appearance or the action of the vocal cords or larynx. The carina was sharp and mobile. The endobronchial mucosa was normal throughout. The bronchial orifices were normal in appearance and distribution and there was no evidence of secretion coming from any one of them. The scope was withdrawn uneventfully. This is March 19th. The same service. This is Doctors Soutter and Merrill, Operators; Doctors Moran and Baker, Assistants. This was dictated by Dr. Merrill.

Preoperative diagnosis: Question of lung tumor. Ques-

tion of infarct of right lower lobe. After a rather prolonged but not violent induction, the intracheal tube was placed. The patient was turned in the lateral decubitus position, and the skin of the right neck, chest, and shoulder was prepared with two washes each of alcohol and tinted tincture of zephiran. The chest was opened through a lateral incision, and the 5th rib was removed subperiosteally. Hemostasis was secured by clamping and suture-litigating the bleeding vessels. The lung was easily freed from its parietal pleural adhesions. The fissure between the middle and lower lobes was identified and entered with sharp dissection using scissors. The lower lobe branch of the pulmonary artery was identified. The middle lobe take-off was identified, [380] and the lower lobe artery was cleaned with sharp dissection with scissors and with wipes and, finally, a Moynihan clamp. A silk ligature was tied proximally. A Kelly clamp was slid down the pulmonary artery, and the artery was divided close to the clamp. A suture ligature was placed in the stump, and the clamp was removed. When the Kelly was removed, a small blood clot fell into the thorax. The lung was freed posteriorly, and the pulmonary ligament was divided between Moynihan clamps, close to the lung. The bleeding points were ligated. The inferior pulmonary vein was identified, dissected with difficulty, and ligated. A Kelly clamp was again slid down the pulmonary vein, and the vein was divided proximal to the Kelly clamp. The lower lobe bronchus was identified, care being taken not to molest the middle lobe bronchus take-off. A curved clamp was placed across the bronchus, and two bronchial stitches were placed at either end of the bronchus and tied. Because of the aforementioned situation, it was impossible to divide the bronchus gradually and put in stitches progressively, therefore the bronchus was divided immediately, the first a central bronchial suture was placed and then several others at 2-3 mm. intervals.

These were of #000 silk. A pleural flap was freed posteriorly and the proximal stump covered with it.

During this procedure a bronchial artery was divided and ligated, but grossly there seemed to be no impairment of the bronchial circulation. The bronchus was moderately friable, and [381] the closure of the bronchial stump was made more difficult by the take-off of the superior basal segment which interfered with things to some extent.

At the end of the closure of the pleural flap over the bronchus the latter was inadvertently perforated, and two sutures were required to close the perforation in the bronchus. The lung was re-expanded while the chest was filled with normal saline.

There was no evidence of leak of the bronchial stump. Previously, an adherent area between the middle and lower lobes, which had been divided between Kocher clamps and closed with a double layer of #000 chomic catgut, first a baster and then when the Kocher was removed an over-and-over continuous stitch, appeared grossly normal.

On testing with saline this did not leak either. Water-tight closure of the bronchial stump and middle lobe having been checked, a chest tube was placed in the posterior chest wall this being a #24 Foley catheter with the balloon inflated.

Interrupted #00 silk sutures were placed to close the pleura. In the posterior portion these interfered with either the 5th or 6th intercostal nerve, and it was elected not to close the pleura in that particular area lest the nerve be involved in the suture line. The muscle layers were separately closed, two layers anteriorly and posteriorly, using interrupted #00 braided silk sutures. The subcutaneous tissues were closed with interrupted inverted #00000 silk sutures. The skin was closed with #000 silk. The patient withstood the procedure well and was returned [382] to the recovery room in good condition after a dry sterile

dressing had been applied and after the pulsations of the chest portal had been found. The patient received approximately 1,250 cc. of whole blood during the operation and immediate postoperative period in the recovery room.

Signed by Dr. Keith Merrill.

The Witness: This is the surgical dictation by Dr. Johnston. This is Michael O'Brien, Thoracic Service, Dr. Johnston, Operator, Dr. Gualtjeri, Operator. March 21st. Diagnosis was probable recent pulmonary infaret. Question of Thrombophlebitis, both lower extremities. Operation was division and litigation of superficial femoral vein, bilaterally.

Preoperative diagnosis, as above. The lower abdomen and thighs were prepared with septisol, ether, and tincture of zephiran and draped in an appropriate manner. Under local one per cent novocain anesthesia an oblique incision was made in the left anterior thigh extending from the crease at the point of the femoral pulsation downward for a distance of 10 cm. The deep fascia was divided, and the femoral sheath was easily identified.

The sheath was opened. The femoral vein was found. The superficial femoral vein was divided immediately below the entrance of the profunda femoris vein. Care was taken to leave no pouch below the level of the profunda. The divided ends of the vessel were doubly ligated with #0 silk, one ligature in each [383:384] instance being a suture-ligature. A small specimen of vein was taken for biopsy purposes. At that operation there was no evidence of thrombus at this level and no evidence of active thrombophlebitis or periphlebitus. An entirely similar procedure was carried out on the right side. The patient withstood the procedure well.

Signed, Dr. Johnston.

[Adjourned.]

[385] FIFTH DAY

Court Room No. 5
Federal Building, Boston
December 6, 1955.

CHARLES ROBERTSON, Sworn

Direct Examination by Mr. Prendergast

Q. Now, your name is what, sir? A. Charles Robertson.

Q. You live where? A. In Milton, Massachusetts.

Q. What street? A. Randolph Avenue.

Q. Your profession is what? A. Surgery.

Q. You specialize in what? A. I am a general surgeon, and I am in charge of the Vascular Clinic at the Massachusetts Memorial Hospitals in this city.

Q. What do you mean by "Vascular Clinic"? A. The peripheral vascular section is a section of the medical and surgical clinics designed to funnel vascular patients into a team of physicians particularly interested in that series of cases.

The Court: What is the field of vascular medicine? Will you tell the jury? You don't mind if I suggest that?

Mr. Prendergast: No.

The Court: Mr. Mahony?

[386] Mr. Mahony: No. I suppose vascular is the adjective of vessel, isn't it?

The Witness: Yes. The common usage of the term at the present time is with reference to those cases that deal with disorders of the blood vessels, both arteries and veins, exclusive of the heart and diseases that primarily affect the heart. In other words, disorders of the heart ordinarily do not fall into the vascular clinic range. We primarily deal with arterial and venous problems in the abdomen, chest, and in the extremities.

The Court: What medical school did you go to?

The Witness: Syracuse.

Q. You are a graduate of what school, Doctor? A. Syracuse University and Medical School.

Q. All right. That was when? A. 1939, from Medical School.

Q. What have you been doing since? In other words, give us your qualifications. A. Five and a half years of surgical training at Montreal, and later at the Massachusetts General here, overseas with the Army, and then since that time, since 1947, I have been with the Smithwick Foundation, which is a surgical research group particularly interested in diseases of circulatory disorders and high blood pressure, and I am on the faculty of the Boston University School of Medicine.

[387] Q. All right.

Mr. Mahony: What hospital, did he say?

Q. Tell him the hospital. Massachusetts Memorial? A. Massachusetts Memorial Hospital.

Q. You haven't had Mr. Michael O'Brien as a patient? A. No.

Q. You have seen him? A. I have seen him only in the hallway, sir, here.

Q. Have you had some reference to his hospital record out there, the X-rays and so forth? A. I have reviewed the hospital record that was available, made available to me by you.

Q. Did you also see the Massachusetts Memorial record? A. I have seen the discharge summary.

Q. And you have seen the different X-rays? A. Yes, sir.

Q. And have you discussed the matter with Doctor Burke relative to his X-ray findings? A. Doctor Burke only—

Q. Don't say that. You discussed it with him? A. Yes.

Q. Now, Doctor, let us assume that Mr. O'Brien, the plaintiff in this action, was driving a truck along the highway, and as a result, or rather while he was driving along,

his truck and the automobile driven by another individual were in contact as a result of which the motor vehicle he was driving took a turn to [388] the left, and after the contact—and then he was thrown out of the seat—that thereafter or in the course of the movement of the truck it was then struck by another automobile, I think the evidence will appear almost instantaneously, that then it was in contact with some of these cement posts that you have seen, guard rails along the side of the highway, that the truck was badly damaged, that the plaintiff received, I think it was, five fractured ribs, that he was taken to the hospital, and it was shown he had fractured five ribs, that then in the hospital there were two hernias discovered, that thereafter there was some tapping, that later—that previous to the—or after the tapping there were some X-rays taken and the right lung was clear, that he was operated on for the hernias, and X-rays were then later taken and there was a density that appeared in the right lung, in the X-ray of the right lung, and that he was then operated upon by Doctor Soutter and one of the lobes were removed, have you an opinion, first of all, Doctor, whether or not the accident was an adequate cause of the hernias that I have already described to you? A. It could be.

Mr. Mahony: I ask that that be stricken out.

The Court: That may.

Q. We can't deal in possibilities; we have to deal in probabilities. Have you an opinion? A. Well, in that case I would say it did constitute an a[illegible]quate [389] cause of this hernia.

Q. Have you an opinion, Doctor [illegible] forgot to include in my hypothetical question that the trouble with the right lung is an infarct—is that what you call it? A. Yes.

Q. Have you an opinion whether the accident was an adequate cause of the infarct that appeared in the right lung?

Mr. Mahony: My objection.

The Court: I will permit it.

Q. Have you an opinion? A. Would you restate that, please, sir?

(The question is read.)

A. Yes. I believe I can in truth answer that is an adequate cause.

Q. Of the infarct? A. Of the infarct.

Q. Yes. A. I think it—

Q. Well, wait. You better let Mr. Mahony examine. A. Well, could I—

Mr. Mahony: Wait just a minute.

The Court: I think the doctor wanted to give some other answer.

Q. All right. Go ahead and give the answer.

Mr. Mahony: I assume the answer

[390] Mr. Prendergast: Now—

Mr. Mahony: The question was—

The Court: He hadn't finished his answer.

The Witness: Well, I would like to—

The Court: Had you finished?

The Witness: No, sir. I would like to say a little more.

Mr. Mahony: Did I understand the question was whether he had an opinion as to whether it was an adequate cause, and his opinion was Yes?

The Court: Then he gave the opinion and he wanted to add to it. I said to him, "Isn't that true? Didn't you want to add to it?" He replied that he did.

The Witness: If I could. Is that permitted?

Mr. Mahony: Well, this is subject to my original objection.

The Court: Yes.

A. (Continuing) I think that the contingency here is entirely dependent upon whether we can establish—in my opinion the accident certainly was an adequate cause for

the hernia; the repair of this hernia then could be the direct cause of the pulmonary infarct.

Q. You see "could be"—

Mr. Mahony: May the answer be stricken?

The Court: It may be stricken.

[391] Q. Doctor, when you use the word "could", it indicates possibility. That is the trouble with your answer. A. I fell into the same trap before. I would say, in my opinion it constitutes—

Mr. Mahony: He set that trap for you; nobody else did.

Mr. Prendergast: I did not.

A. In my opinion it does constitute an adequate cause of the infarct on that basis.

Q. All right.

Mr. Prendergast: That's all. Go ahead, Mr. Mahony.

Cross Examination by Mr. Mahony

X-Q. Now, Doctor, you have been in court before, have you? A. This is my first appearance in this capacity.

X-Q. I'll go easy with you, then.

Mr. Prendergast: Now don't let that mislead you. Beware of Greeks who bear gifts.

X-Q. Well, now, Doctor, he put what they call a hypothetical question to you. You understood that? A. Yes, sir.

X-Q. That you were to assume what he said to be facts, and to base your opinion on those assumed facts, correct? A. Yes.

X-Q. Did you take into consideration all the facts which he put to you and asked you to assume? [392] A. Yes, sir.

X-Q. Did you take into consideration anything other than those facts that he asked you to assume? A. Not in my answer to his hypothetical question.

X-Q. And the furthest you thought you could go was a possibility, is that correct? A. Well, I altered that to probability, and I think I would stand with the probability.

X-Q. All right. Now so far as the hernia is concerned, did you look at the hospital record, the Saugus Hospital record? A. Yes, sir.

X-Q. Did you get in touch with Doctor Cotta? A. No, sir. I have only read his statement in the summary that was available.

X-Q. Did you learn that the ring was sufficiently large to let this hernia, which was the size of a small orange, come down and be easily reduced? Did you learn that? A. I heard that testimony the other day here.

X-Q. That would indicate to you, would it not, Doctor, that that ring, prior to the time that the hernia was discovered or reported, had enlarged itself so that that could come down, the hernia could come down, is that correct? A. Prior to it, correct.

X-Q. That ordinarily is a matter of long development, is it not, the enlarging of a ring to that extent? [393] A. Well, in my experience not necessarily.

X-Q. Isn't it ordinarily so, Doctor? A. Well, a hernia—

X-Q. No. Can you answer my question? Isn't it ordinarily so? A. Well—

Mr. Prendergast: He said "not necessarily so." I thought he answered it before.

Mr. Mahony: I'm asking him.

X-Q. Isn't it ordinarily? Isn't it so as a general rule? A. Well, with a direct hernia as a rule the contents are reducible quite aside from whether it is an acute hernia or whether it is one that has developed, as you described, over a long period of time.

X-Q. So that a hernia, which is the size of a small orange, comes down through the ring and is easily reduced, is equally consistent with a long developing hernia as it is with an acute hernia, correct? A. I would say you couldn't differentiate on that one feature.

X-Q. Doctor, did you learn there was no evidence of any bruising, bleeding, laceration, or anything like that, any visible marks on the lower abdomen or groin of this man? A. That is my understanding.

X-Q. If there was an acute hernia which was produced by a blow in the region of the groin or abdomen, you would ordinarily expect some evidence on the external part of the body, would [394] you not? A. Well, I would not expect it as a necessary part of this hypothetical situation. The hernia protrudes at a weak portion in the anatomy of the abdominal wall. It's like a weak point in an inner tube and pressure on any area will pop it out in that location. The particular anatomy of hernia, whether it be direct or the more usual, congenital type, does not depend upon local damage to this area for the protrusion to occur. I have seen a fair number of hernias that have allegedly occurred, have occurred acutely in connection with lifting a patient on or off a bed, or in connection with a sudden blow in a fight or something of that sort, and in only one instance where a person had been kicked in a fight, which was probably quite aside from the actual force which caused this sudden herniation was there local evidence of bleeding and trauma. I would say it would be—

X-Q. A kick in the groin, a punch in the groin you refer to? A. Well, he was wrestling with this man and apparently he was aware, while he was trying to hold this assailant, of this sudden pain and mass being produced in his groin, and I would visualize that this hernia had occurred in connection with some of the sudden increase in intra-abdominal pressure and not necessarily have to have local evidence of injury.

X-Q. Well, Doctor, that is what I was coming at. You used the word "congenital" in part of your answer. That means that it is [395] there from birth? A. Yes, sir.

X-Q. And ordinarily these hernias come—when you re-

ferred to increased intra-abdominal pressure—is that what you said? A. Yes, sir.

X-Q. That if you are lifting and you strain, that is the ordinary type of strain or increased intra-abdominal pressure that causes the hernia? A. Yes, sir.

X-Q. And if, for instance, a person is more or less constantly constipated and strains at the stool, that strain increases intra-abdominal pressure, is that correct? A. Well, that is a little trickier, because the individual usually is seated during this process.

X-Q. That is the way most of these hernias develop, is it not, by that sort of strain? A. Lifting, primarily.

X-Q. All right. In the question which Mr. Prendergast put to you, there was no evidence that he asked you to assume that he was struck in the abdomen or the groin by the gears, was there? A. Well, I would assume that the trauma incident to fracturing five ribs would involve a very real amount of sudden commotion.

Mr. Mahony: May the answer be stricken out?

The Court: Let me have the answer. Do you object to it being stricken?

[396] Mr. Prendergast: I don't care what he does with it, your Honor.

The Court: But I do.

(The answer is read.)

The Court: I think I will let that stand.

Mr. Mahony: Beg pardon?

The Court: I will allow it to stand.

X-Q. Well, the question I put to you, Doctor, was, in the answer you gave— A. Yes, I think you are correct. I should agree with you.

X-Q. Thank you. There was nothing in the question with reference to this individual striking the gear shift, either with his abdomen or groin, was there? A. No, sir, not in the hypothetical question.

X-Q. So you excluded that from your opinion, didn't you? You didn't take that into consideration when expressing your opinion? A. I think that would be implied as I gave my earlier answer.

X-Q. Doctor, do you mean to say you took in by implication an assumption that this man struck the gear shift? A. No. We didn't go into the detail of what he struck.

X-Q. That is what I am asking you. You didn't take into consideration in your answer any contact between this man's body and the gear shift, did you? A. Well, we didn't—

X-Q. Can't you answer the question Yes or No? [397] A. Yes, if there is a Yes or No answer. But the assumption and mere statement that here was a man who was driving a truck, suddenly struck, and it came up against some cement post, and he came out of the accident with broken ribs—

X-Q. Can't you pin your answer down to my point about striking the body on the gear shift levers? You didn't consider that at all? A. Not in that particular detail, no, sir.

X-Q. All right. Now have you looked at the Massachusetts Memorial Hospitals record? A. Yes, sir.

X-Q. And the X-ray reports? A. Yes, sir.

X-Q. And the X-rays at the Saugus Hospital? A. Only the reports. I didn't see those films.

X-Q. You didn't look at those directly? A. No, sir.

X-Q. Did you learn that up as late as January there was no evidence of any abnormal density in the right lung? A. Yes, sir.

X-Q. And by that time the fracture of the ribs had been united, healed? A. Yes, sir. I recall that.

X-Q. Did you learn that in the X-rays which were taken at the Massachusetts Memorial Hospitals? You said you talked to [398] Doctor Burke who demonstrated them here, that there was a gradual diminishing area of density in

the right lung before any operation was performed at the Massachusetts Memorial Hospitals? A. I don't think I can in truth say that this area was diminishing, actually.

X-Q. You didn't learn that? A. The particular area that was directed upon for his surgical exploration.

X-Q. Did you look at the X-rays yourself? A. Yes, sir, I have seen the X-rays.

Mr. Mahony: (To the Clerk) May I have that report?

(A long pause.)

A. (Continuing) I recall the record, sir—may I make a statement?

Mr. Prendergast: There is no question, Doctor. Did you ask a question, Mr. Mahony?

Mr. Mahony: Nothing is pending now. (Long pause.)

Mr. Prendergast, do you remember where the last paragraph read by the doctor last week appears here?

(Mr. Prendergast and Mr. Mahony confer.)

X-Q. Doctor, did you learn from the record that there was no evidence at any time up to when he went to the Massachusetts Memorial Hospitals of any thrombo phlebitis? A. Yes, sir.

[399] X-Q. And thrombo phlebitis means what? A. It is a term that applies to an obstruction of the venous return from an area of an involvement.

X-Q. So up to that time, when he went into the Massachusetts Memorial Hospital, there was no evidence of any thrombo phlebitis in any blood vessel of this individual, was there? A. That is my recollection of the record.

X-Q. Doctor Soutter said that the thrombo phlebitis of the left leg which is referred to in the final diagnosis on that record was the thrombo phlebitis as a result of the operation at the Massachusetts Memorial Hospital. A. Yes, sir. I recall that.

Mr. Mahony: That is all.

Redirect Examination by Mr. Prendergast

Q. Doctor, what operation took place at the Massachusetts Memorial Hospital? A. This patient had, as Doctor Soutter outlined, an exploration of his lung, to remove the segment of the lung, and when the examination of the tissue revealed that the cause of the mass by X-ray of the density was a blood clot which had lodged in the pulmonary artery and had produced a localized area of change, then the next logical approach to this man's difficulty was to prevent its occurring again. It is well known if an individual has one embolus or blood clot that breaks away from the leg it may very well occur again. Therefore, three days [400] after one was removed, both veins in the groin, the large veins in the groin were ligated and divided to trap any clots that were still in the legs. This is based on current knowledge about the cause of blood clots that go to the lung.

Q. Well, to get specific, what I wanted to find out from you definitely is this: The infarct was a clot, a blood clot or embolism in the lung? A. It was a blood clot apparently that had been there, according to the best information the pathologist could give Doctor Soutter, for about a month.

Q. Now, Doctor, did that blood clot precede the thrombophlebitis that is in this hospital record? That is what I am trying to get. A. So far as we can tell, there is no question about that. The thrombophlebitis mentioned here is a discharge diagnosis and occurred as a result of the venous interruption carried out after the pulmonary infarct had been demonstrated.

Mr. Prendergast: That's all.

Mr. Mahony: That's all, Doctor.

Mr. Prendergast: Now may we have the blackboard marked as a Plaintiff's Exhibit?

Mr. Mahony: I have no objection to it going out. I have no objection to it being used by the jury as a chalk

or chart. But I submit it not be dignified as an exhibit, because it is not according to scale.

[401] The Court: It was drawn by an engineer, wasn't it, from the Public Works Department?

Mr. Mahony: That's right. It is free-hand and not according to scale.

Mr. Prendergast: It is evidence the jury have a right to consider.

Mr. Mahony: I haven't the slightest objection to it going into the jury room and the jury considering it as a chalk.

Mr. Prendergast: All right. Suppose we have to go to the Circuit Court with it? The Circuit Court may want such information.

The Court: I think, Mr. Prendergast, strictly speaking, I don't see any difference. If it is marked as a chalk, it goes up as a chalk. Mr. Mahony hasn't any objection to having it go up as a chalk.

Mr. Mahony: No.

The Court: That's right.

Mr. Prendergast: Will you come up?

(Conference at the bench between Court and counsel, not taken.)

The Clerk: Plaintiff's Chalk No. 1.

(Sketch on blackboard marked Plaintiff's Chalk No. 1.)

The Court: I will deny the motion, with the exception of paragraph 3, which I will rule on later on.

Mr. Mahony: My rights are saved.

[402] Mr. Prendergast: I rest.

Mr. Mahony: Mr. Sousa.

AMERICO J. SOUSA, Sworn

The Court: Will counsel come up a minute?

(Conference at the bench between Court and counsel, as follows:)

The Court: So there will be no possibility for mistrial, is this a State police officer?

Mr. Prendergast: Yes.

The Court: I would like to have it made clear to him that there is to be no refrence to the Concord Court, directly or indirectly.

Mr. Mahony: To what?

The Court: To the Concord Court.

Mr. Mahony: That is all right. Shall I speak to him?

The Court: Yes. Come over here, Mr. Witness. You are a State Police Officer?

The Witness: Yes, your Honor.

The Court: Under no consideration are you directly or indirectly to use this term "the Concord Court".

Mr. Mahony: There is no possibility, I do not think, in my examination.

The Court: All right.

(End of conference at the bench.)

[103] The Court: I am not limiting the direct examination, you know.

Direct Examination by Mr. Mahony

Q. What is your name? A. Americo J. Sousa.

Q. Where do you live? A. 48 Hubbard Street, Ludlow, Mass.

Q. You're a State police officer? A. I am.

Q. You have been connected with the State Police for how long? A. 4 years.

Q. You are now stationed at what barracks? A. Munson State Police Barracks.

Q. Munson? A. Munson.

Q. In June, 1952, you were connected or stationed with what barracks? A. At the State Police Barracks, Concord.

Q. On that date was your attention called to an accident that had happened on Route 2 in the vicinity of the line between Concord and Acton? A. It was.

Q. At what time? A. Approximately 1:40 p.m.

Q. How was your attention directed to it? [404] A. I was directed by a radio call to my cruiser while on patrol.

Q. Did you go in the cruising car to the scene of the accident? A. I did, sir.

Q. Were you alone or was there someone, some State police officer with you? A. I was alone at the time.

Q. When you got to the scene of the accident, what did you see there? What did you observe in the area? A. I observed the accident took place approximately 60 feet—

Mr. Prendergast: Wait a minute. I have no objection to him telling about marks or the position of the cars. I object to conclusions.

The Court: All right. The jury may disregard that.

Q. Mr. Sousa, when you got to—

Mr. Mahony: That is probably my fault in referring "to the scene of the accident".

Q. When you got to the vicinity of the Acton and Concord line—

The Court: Do you want the blackboard pulled out, Mr. Mahony?

Mr. Mahony: I don't think so, not at the present time.

Q. —did you see any automobiles or any truck? A. Yes, I did.

Q. All right. Moving east from the Concord-Acton line, which was the first vehicle that you saw? [405] A. The

first vehicle I observed was a Ford sedan, a 1951 Ford sedan.

Q. And the next one? A. A tank trailer unit.

Q. And the next? A. A Chrysler.

Mr. Prendergast: Well, does he mean the most easterly vehicle was the Ford? Is that what you mean?

Q. You were coming from Concord? A. Yes.

Q. Proceeding towards Acton. So the first car you came upon was a Ford? A. Yes.

Q. Which we have described as the Whitney car. Then you saw the tanker? A. The truck.

Q. The truck. And the next was the Chrysler or Hobart car? A. That's right, sir.

Q. Will you tell us how far from the Concord-Acton line the Hobart car was?

Mr. Prendergast: That is the Chrysler.

Mr. Mahony: Yes.

A. The Chrysler from the Acton-Concord line was approximately 80 feet or so.

The Court: Do I understand, Mr. Mahony, if I may [406] interpose, without interrupting your trend of thought, by the Concord-Acton line, you are coming towards Boston?

Mr. Mahony: He was proceeding westerly from Concord toward Acton.

The Court: That is in the direction of Cambridge, so to speak?

Mr. Mahony: No, east is in the direction of Cambridge. If you travel from Acton to Cambridge, you are going east; if you travel from Cambridge to Acton, you're going west, and Concord is in between those two points.

Q. Well, how far was the truck from the town line there? A. The truck was from the Hobert car approximately one car length.

Q. How far was the Whitney car from the truck, from

the town line or from the truck? A. The Ford was right alongside of the truck.

Q. When you got there, was Mr. O'Brien there? A. Yes, he was, sir.

Q. Where did you see him? A. He was in the truck.

Q. Whereabouts in the truck? A. In the cab, the cab section of the truck.

Q. Whereabouts in the cab? A. I couldn't rightfully say.

Q. All right. Were Mr. and Mrs. Hobart there? [407] A. Yes.

Q. And Mr. and Mrs. Whitney? A. Yes.

Q. Will you tell us what you observed about these three vehicles first? A. I observed that the Chrysler, the Hobart car, Doctor Hobart's car, the whole front end was badly demolished, and that the front end of it--

Q. Is that a fair representation of the Hobart car as it was there after the accident? A. Yes, sir.

Q. This is Exhibit C, Defendant's Exhibit C. All right. Now go ahead. A. I observed the front end of the Hobart car was facing in a southerly direction, diagonally across Route 2, and that the car was in the extreme right lane.

Mr. Prendergast: Excuse me. Now so we will get this right—the Chrysler is in the extreme right lane. Which lane do you mean?

The Witness: The extreme right lane would be the west bound lane.

Q. That would be the northerly side of the road? A. Yes, sir.

Q. And the rear end of the Hobart car was where with reference to the extreme northerly side of the traveled part of the way? [408] A. The back end of the Hobart car was up against the fence.

Q. How far was the State fence from the hard part or traveled part of the way? A. I believe there was a 2-foot dirt shoulder on the right, on the north side of Route 2.

Q. Then the fence. Now so far as the truck is concerned, what did you observe about that? A. The truck was facing in a northerly direction with the front end up against the State fence, and I observed that the right front wheel of the truck had leading from it some tire marks on the road, which led from the right front tire 90 feet into the eastbound lane, approximately 2 feet over the solid white line.

Q. Over the what? A. Over the line.

Mr. Daley: If that is offered as any indication as to a line put there under authority of the State to mark off the road, I object, because of the evidence we have.

Mr. Prendergast: Unless it is legally established in accordance with law, that it was there in accordance with law.

Q. This mark you have been referring to—

The Court: Let me have the question and answer.

(The question and answer are read.)

Mr. Mahony: This mark, I think the officer has been referring to, is a mark, a wheel mark.

[409] Q. Is it not? A. It's the black tire mark left on the Macadam surface of the road by the right front wheel of the tractor truck.

Q. That you say went 90 feet back toward the west? A. And that went 90 feet back towards the westerly direction.

Q. From the most westerly point where it began, how close was that mark where it began to the right side or the most southerly side of the traveled part of the road? A. Approximately 8 feet.

Q. Where it ended you say was at the right front wheel of the truck—it was up against the fence? A. Yes.

Q. So far as the Whitney car is concerned, what did you observe about that? A. The Whitney car was—the front end of the Whitney car and the front end of the truck were

up against each other practically, a few inches apart, and it was also facing in the same direction as the truck, north.

Q. Facing north? A. Diagonally across Route 2 on the extreme westbound lane.

Q. What did you notice with reference to whether there was any work or construction going on in that area? A. There was construction, I believe, which started approximately at the Concord-Acton line and the construction continued on in the westerly direction, into Acton. The road was, in regards [410] to the construction there were horses up, and the sand pile or the excavation that had been dug took up—at the point of the holes in the roadway—the extreme westbound lane.

Q. That is the most northerly lane? A. That's right, sir.

Q. Now, did you see any excavation in that vicinity? A. Yes, sir.

Q. Were the excavations in the hard traveled part of the road, the right lane, the most northerly lane, or were they in the shoulder? A. The excavation was in the extreme westbound lane, in the hard part of the road, and led up until the State fence.

Q. It led up to the State fence, did you say? A. On the north side, yes.

Q. Do you know what the work was that was going on there? A. I believe the work was some type of Water Department work.

Q. Now, in the vicinity of the accident, you say there were horses. Do you mean wooden horses? A. Yes, sir. And I believe there were two horses prior to the first excavation, which was at approximately the line, and these horses were in the extreme right lane.

Q. That is the ~~most~~— A. The westbound lane, and had a sign on each horse, "Drive Slow", I believe, and "Construction" at the other, and there were horses around the excavation itself, which took up the [411] complete—that

particular section of the northbound lane, or the westbound lane.

Q. How far easterly in Concord did that construction work go? A. The first bit of construction was right at the line. The only thing relative to the construction that was easterly of the first construction was the signs put up in the middle of the westbound lane or the northerly lane.

Q. Where were those signs put up? How far east of of the town line? A. I believe the first sign was about 80 or 90 feet from the town line.

Q. All right. Now at some time did you talk with Mr. O'Brien relative to this accident? A. Yes, sir, I did.

Q. Where was it that you talked with him? A. I talked with Mr. O'Brien, and obtained a statement from Mr. O'Brien at the Emerson Hospital in Concord.

Q. What time? A. Approximately 4 o'clock, 3:30 in the afternoon, the afternoon of the accident.

Q. What did you say to him, and what did he say to you?

Mr. Prendergast: Well, don't we have to have his physical condition first, your Honor?

The Court: Well, you have a right to cross examine him.

[412] Q. What did you say to him, and what did he say to you? A. Well, I asked Mr. O'Brien, in the presence of one of the other operators, at the hospital—I believe it was in the waiting room—

The Court: Who?

The Witness: In the presence of Mr. Whitney, the operator of the Ford.

Q. In the waiting room? A. Yes, of the Emerson Hospital, in the emergency. I asked him what he could tell me about the accident, and how he was feeling. He stated he had a pain in his chest. And the only thing he said, that he could tell me, was that he was traveling east on Route 2, at an estimated speed of 25 to 30 miles an hour

in the right lane. He said he didn't see any oncoming traffic, or notice anything unusual.

Q. Yes. What was his condition at that time? Where was he in the waiting room? A. I believe he was sitting down in a chair.

Q. Yes. Mr. Whitney was there, too? A. I believe I brought Mr. Whitney to Mr. O'Brien with me when I was looking to get a statement from him.

The Court: Had you already gotten a statement from Mr. Whitney?

The Witness: I couldn't rightfully say. Either he had or—

[413] The Court: Did you take Mr. Whitney's statement also in the presence of Mr. O'Brien?

The Witness: Yes. I asked Mr. Whitney to tell me his story in front of him.

Q. You say Mr. Whitney was there at the same time as Mr. O'Brien? A. At the Emerson Hospital.

Q. And how close were they together? A. I believe Mr. Whitney was standing, and Mr. O'Brien was sitting down, and I was sitting down aside of Mr. O'Brien.

Mr. Mahony: I would be glad to ask him what Mr. Whitney said in Mr. O'Brien's presence, if my brother wants me.

Mr. Prendergast: Why don't you? Try it. I'll object if I want to, if I don't like it.

Mr. Mahony: Okay.

Q. What did Mr. Whitney say to you, as to how the accident happened, while Mr. O'Brien was there? A. Mr. Whitney stated that he was traveling west on Route 2 at an estimated speed of 30 miles an hour, and that the car in front of him was approaching the construction and was slowing down. "The car in front of me pulled out so as to get by the construction", he stated. "I noticed this truck coming east was over the white line about 2 or 3 feet. The car in front applied his brakes, and so did I

The truck hit the car in front of me, forcing him back and to the right side of the road, [414] and the truck curved over to the right side of the road, too. As it did so, he hit my left front, turning me around and up against the State fence."

Q. That is Mr. Whitney's statement? A. Yes, sir.

Q. Now did you see Mr. Hobart in the hospital? A. I didn't see Mr. Hobart until the following day at the Massachusetts Memorial Hospital.

Q. That was not in the presence of Mr. O'Brien? A. No, sir.

Q. The shoulder, you said, on the north side, was about 2 feet wider than the fence? A. It extended from the end of the Macadam surface on the north side of the road to the State fence. It was just sort of a sandy strip, approximately a foot and a half shoulder.

Q. On the south side, how wide was the shoulder? A. I don't believe there was any.

Mr. Prendergast: Not what you believe. Tell us what you know.

The Witness: I didn't see any shoulder.

Q. All right. The wheel mark you said that began 90 feet back of where the truck finally came to rest, did I understand you to say that that began at a point which was 8 feet from the extreme northerly side of the north lane, that is, the hard Macadam surface? [415] A. No. That extended approximately 8 feet from the southerly lane.

Q. That is what I mean. 8 feet from the southerly side of the eastbound lane? A. That's right, sir.

Q. And 8 feet from the southerly edge of that lane? A. Yes, sir.

Mr. Mahony: You may inquire.

Cross Examination by Mr. Prendergast

X-Q. Have you your original notes? A. No, sir. I have my accident report, which was—

X-Q. No, no, please. You have testified many times, haven't you? A. I don't have my original notes.

X-Q. You have testified in court many times, haven't you? A. Yes, sir.

X-Q. In four years? A. Yes, sir.

X-Q. So you are pretty well acquainted with what lawyers expect from you in a court room, aren't you? A. Yes, sir.

X-Q. Now, when you went to the scene of this accident, you made certain records in handwriting, didn't you? A. Yes, sir.

X-Q. Have you those records? A. I don't know, sir.

X-Q. You don't know where they are? [416] A. No, sir.

X-Q. Do you keep those records in a book? A. I keep those records in a little notebook, yes.

X-Q. And you finally fill up the notebook, don't you? A. I do.

X-Q. And then don't you lay it aside and save it for reference, for future reference in case you are asked for it when you get into court? A. For a period of time, yes.

X-Q. Now you haven't kept this book that had the records in this case? A. No, sir.

X-Q. Well, have you looked to see whether you have kept it or not? A. Yes, I have.

X-Q. When did you look? A. When I got the notice to appear in court.

X-Q. When was that? A. Approximately a week ago.

X-Q. Well, this is your report? A. My report of the accident, yes, sir.

X-Q. And from this report, you have refreshed your recollection as to what you saw, is that right? A. Yes, sir.

X-Q. And as to what you were told? [417] A. Yes, sir.

X-Q. Well, now, I notice you have got a mark right in front of Obstruction in the roadway—a cross None? You have that, haven't you? A. Yes, sir.

X-Q. That means there were no obstructions in the roadway, doesn't it? A. That's right, sir.

X-Q. And that is what you made or put down in your own report? A. Yes, sir.

X-Q. Now you are telling us here there were obstructions in the roadway, aren't you? A. Yes, sir.

X-Q. So your report is incorrect, or your testimony is incorrect? One of the two? Isn't that right? A. No, sir.

X-Q. Well, were there obstructions in the highway, in the roadway? A. There were obstructions on the road, yes, sir.

X-Q. You say here there weren't any obstructions in the roadway, don't you? A. Yes, sir.

X-Q. Well, they can't both be right, can they? Both statements can't be right, can they? A. Yes, sir.

[418] X-Q. Well, how can there be obstructions in the roadway in one instance, and then you say there were none—no obstructions in the same roadway? Will you tell the jury that? A. Because you're referring to the roadway there; I was referring to the two lanes available for traffic.

X-Q. Oh, you were? A. Yes, sir.

X-Q. Show me any place where it says "Two lanes available for traffic." A. On the reverse side of the report.

X-Q. Where? A. Leaving two lanes open: 20 feet.

X-Q. Leaving two lanes open: 20 feet. But over here you have nothing about two lanes or three lanes? A. It is all one report.

X-Q. All right. What is this report? A. That is a continuance of the same report.

X-Q. Well, let's see. You were called to the scene of this accident by some radio information, is that right? A. Yes, sir.

X-Q. And when you arrived there, you came down from the easterly side of the place where the accident apparently had occurred? A. Yes, sir?

X-Q. That is, you came from the Concord Reformatory side, down over the decline? [419] A. Yes, sir.

X-Q. And the decline, you agree that the decline is in substance the same as described by the Public Works Department of the witness here? Do you agree with that?

The Court: Bring out the blackboard. Can you see it now?

X-Q. You came down over that decline? A. Yes, sir.

X-Q. What kind of location was it? What is on the left and the right hand side of the highway as you came down? A. Traveling west?

X-Q. That's right. A. I believe there is some open field on the southerly side.

X-Q. Over here (indicating)? A. Yes, sir.

X-Q. What is over here (indicating)? A. A few houses at the top of the incline, and they start at the bottom again.

X-Q. Up here (indicating)? A. At the top of the incline.

X-Q. No houses from the top of the incline until you get down over into Acton? A. Just about at the line.

X-Q. So for a distance of maybe a thousand feet, there isn't a single house, is there? [420] A. My best recollection is, I would say no.

X-Q. As you came along, you were on a 3-lane highway? A. Yes, sir.

X-Q. About 30 feet wide, the whole traveled portion of the highway? A. Yes, sir.

X-Q. As you come down towards Acton on the right hand side, there are cement posts with a guard rail all along it? A. Yes, sir.

X-Q. That guard rail goes practically up to the top of the hill? A. I believe so.

X-Q. Right all the way from the Acton side of the line? A. Yes, sir.

X-Q. The guard rail is all the way along, right? A. Yes, sir.

X-Q. Over on the opposite side, and this is a 2-lane, is a 2-foot shoulder, you say, of soft sand? A. Near the construction area.

X-Q. What kind of shoulder is there all the way along the hill? A. I don't recall whether it's—

X-Q. How long did you work out there on the Police Department near Concord, the Concord Station? A. About 12 months.

X-Q. About 12 months. And the police station is only up here, a matter of a mile, isn't it? [421] A. Yes, sir.

X-Q. It's right near the Concord Reformatory? A. Yes, sir.

X-Q. And you have gone over that road maybe a thousand times in that twelve months, up and down five and ten times a day, right? A. I have been over the road.

X-Q. And you can't tell this Court and jury how much of a shoulder there is from the top of the hill down to the bottom, is that it? A. That's right.

X-Q. Well, all right. You said there was no shoulder on the southerly side here. You're not serious in that, are you? A. Pardon me?

X-Q. You said there was no shoulder on the southerly side of the highway. You're not serious, are you? A. My best recollection is that directly opposite where the 2-foot shoulder is on the right, there was none on the left.

X-Q. Never mind whether it was directly opposite or directly any other way. I'm asking you if from the Concord-Acton line there is a shoulder on the southerly side of the highway up the hill; going all the way up and down the hill? A. I don't know whether there is up and down the hill.

X-Q. Well, you don't know whether or not there is. I

will withdraw that. There is a guard rail all along the southerly side, isn't there? A. There is.

[422] X-Q. Similar to the one on the northerly side? That is so, isn't it? A. Yes, sir.

X-Q. Do you want the ladies and gentlemen to believe the guard rail is right out on the edge of the highway? A. I didn't say that.

X-Q. Well, if there isn't a shoulder, it would have to be? A. No, sir.

X-Q. How far off the edge of the highway is the guard rail? A. Probably a foot.

X-Q. Probably a foot? A. Yes, sir.

X-Q. Are you serious in that? A. Yes, sir.

X-Q. Will you say there isn't a shoulder there of at least 5 feet? A. My best recollection is there is no shoulder there.

X-Q. You're the man who was down at the scene of this accident to make measurements and see what was there? A. Yes, sir.

X-Q. Did you make measurements? A. Yes, sir.

X-Q. Did you measure the shoulders? A. Did I measure the shoulders? There was no shoulder on the left.

X-Q. Did you measure the shoulders of the highway at any place? [423] A. I measured the shoulder near the accident on the north side.

X-Q. Did you measure it near the accident, the scene of the accident on the southerly side? A. No, sir.

X-Q. You measured only the shoulder near it on the northerly side of the highway; is that right? A. That's right.

X-Q. And you found that that was—what did you say? A. Approximately 2 feet.

X-Q. Soft sandy shoulder? A. It was dirt.

X-Q. Now, Mr. Witness, how far from the Acton line—I'll withdraw that. Did you see what we have referred to as the Acton line, the Concord-Acton line? A. Yes.

X-Q. Did you measure the distance from the Acton line to the first channel or cut in the highway on the northerly side? A. No, sir.

Mr. Mahony: The first excavation?

Mr. Prendergast: The first excavation.

A. No, sir.

X-Q. Did you measure the width of the first excavation? A. The width?

X-Q. Yes, the amount of the road cut out? A. Yes, sir.

[424] X-Q. How wide was this? A. 10 feet.

X-Q. You mean all of it? A. Well, 10 feet was the construction area.

X-Q. The total construction area? A. Yes, sir.

X-Q. I think we understand each other. But the construction area consisted of two canals dug part way across the highway and separated by a solid piece of earth? A. I believe so.

X-Q. And each one of those canals or channels were dug part way, that is, in the southerly direction from the north side—they were about 3 feet wide, weren't they, each one of them? A. I believe so.

X-Q. And there were two of them there? A. Yes, sir.

X-Q. As a matter of fact, that channel only came out a distance of 6 feet from the northerly side of the road, the channel itself, dug out, didn't it?

Mr. Mahony: By the "channel", you mean the excavation?

Mr. Prendergast: Well, I'm calling it the channel. It's the same thing.

X-Q. That is so, isn't it? A. I didn't measure that.

X-Q. You didn't measure it? [425] A. No, sir.

X-Q. Well, now, did you measure how far it was from the most easterly side of that excavation—I'll withdraw that. How far did you say the nearest portion of the excavation was from the line? A. I didn't measure that.

X-Q. You didn't. Will you tell us how far it was from the boundary line of Concord and Acton to the nearest car that had been involved in the accident, which is apparently the Chrysler car? A. Approximately 70 to 80 feet.

X-Q. Well, how far was the nearest portion of the excavation from the Chrysler car? A. To my recollection—

X-Q. Did you measure it? A. Did I measure how far the Chrysler car was from the excavation?

X-Q. Yes. A. No, sir.

X-Q. Did you do any measuring that day? A. Yes.

X-Q. Tell us all the parts you did measure. A. I measured the width of the road. I measured the distance of the only available tire mark, which could be determined to any specific vehicle, which was the 90-foot tire mark left by [426] the truck.

X-Q. You told us that. A. Yes, sir. I measured the width of the construction.

X-Q. That's 10 feet. A. The amount of area the construction took of the roadway, 10 feet.

X-Q. 10 feet. A. That's right.

X-Q. And what did you say before that you measured as to the construction? A. The width of the area that it took up of the extreme right lane.

X-Q. Did you measure the width from the very northerly edge of the traveled portion of the highway out into the northerly lane? A. I measured the width.

X-Q. I asked you if that was over 6 feet, and you told me a little while ago you didn't know what it was. A. I don't—will you repeat the question?

X-Q. Didn't I ask you a few minutes ago if that channel wasn't measured—the distance from the very right hand side of the highway or the northerly side out into the northerly lane, a distance of not over 6 feet? Didn't you say that you didn't measure it? A. I didn't measure it.

X-Q. You didn't? [427] A. No, sir. I measured the

width the whole construction took in, which consisted of the sand left on there, the torch pot flares left there, and the horses.

X-Q. You don't know whether that torch flare was there at the time of the accident, do you, of your own knowledge? A. No, sir.

X-Q. No. That torch flare could have been put there between the time of the happening of the accident and the time you arrived there?

Mr. Mahony: Objection.

The Court: Well, that is argumentative.

Mr. Mahony: That is argumentative.

The Court: All right.

X-Q. You don't know the position of the horses on the highway—

The Court: I think, if you don't mind,—we have gone over five minutes. Would you like to take a recess now?

(Recess.)

X-Q. Now you have described this location as being vacant land on both left and right side, north and south side of the road, from the top of the hill down to the Acton lines. That is right, isn't it? A. Yes, sir.

X-Q. That is a distance of a thousand feet, is that right? A. Approximately so.

X-Q. Right here you say is a residential section (indicating)? [428] A. Yes, sir.

X-Q. And there isn't a single residence on either side of that street for the thousand feet, is there? A. Residential section?

X-Q. Please answer my question, will you, Officer? There isn't a single house on either side of the street for a thousand feet? A. To my recollection, no.

X-Q. Now did you ever talk to either or any of these people that were involved in this accident from the time it happened up to we'll say, six or seven months after the

accident, directly, so as to get any report from them? A. I talked to them. I had some conversation with them, I believe, at the scene.

X-Q. At the scene. Then at the hospital? A. Yes, I talked to them.

X-Q. When did you make out this report? A. That report was made out the 23d day of June.

X-Q. The 23d day of June. That was two days after the accident? A. That's right, sir.

X-Q. All right. On the 22d of June neither of these people were in the Emerson Hospital? None of the people involved were in the Emerson Hospital, were they? A. As far as I recall, no sir.

X-Q. And you didn't go back to the Emerson Hospital at any time after you had conducted this conversation with the people at the [429] Emerson Hospital, did you? A. I don't believe so.

X-Q. Well, you say down at the bottom of the report: "Operator of Car A, Mr. O'Brien, had two broken ribs", don't you? A. Yes, sir.

X-Q. Well, the Emerson Hospital discharged him without having any broken ribs, didn't they? A. That's the information. I don't know that.

X-Q. You don't. You don't know. Do your know that the Emerson Hospital did discharge him without having any broken ribs? A. No, sir.

X-Q. No. You don't know that. You never got information from the Emerson Hospital on the 21st of June that he had two broken ribs, did you? A. Yes, sir.

X-Q. From the Emerson Hospital on the 21st of June? A. On the 21st.

X-Q. Are you sure of that? A. Yes, sir.

X-Q. Don't you know they discharged him without having any broken ribs on that date?

Mr. Mahony: Wait a minute. Offer the letter in which they said that.

Mr. Prendergast: That letter is dated one week later, one week later, when they finally woke up. Let me have the [430] letter so there will be no hitch to it.

X-Q. Do you say the Emerson Hospital told you on the 21st of June this man had two broken ribs? A. That was the information given.

X-Q. Who gave it to you? A. I don't know the person in attendance.

X-Q. Do you know the name of the person? A. No, I don't.

X-Q. I see. All right. We will refer to the letter. Now you said something here about a mark beginning 8 feet from the southerly side of the highway and running across to the northerly side. Do you remember that? A. Yes.

X-Q. Show us where it says this mark began 8 feet (handing document to the witness). A. I don't have it.

X-Q. It isn't down there. And you haven't any other record with you that shows this mark began 8 feet from the northerly side—from the southerly side, rather? A. No, sir.

X-Q. No. Whatever records you did have, or that you made at the scene of the accident, have been destroyed; is that right? A. That's right.

X-Q. Have you been back to the scene of this accident since it happened? [431] A. No, sir.

X-Q. Now I think you said that there was—I'll withdraw that. Take a look at the letter here from the Emerson Hospital. Read the first line. You read the first line in the letter. A. "On June 21st you were informed that this hospital after examination and treatment of your injuries that the X-ray showed no fractures."

X-Q. No fractures of what? A. "This report was made after examination of the wet films."

X-Q. Yes. No fractures, O'Brien was informed by the hospital. That is what you read, wasn't it? A. Pardon?

X-Q. That is what you read? A. Yes.

X-Q. You still say that that hospital, on the date of this accident, told you that O'Brien had two fractured ribs, do you? A. That's the information given me on the extent of the injuries.

X-Q. Was this report here made out weeks after the accident? A. No. This report was made out two days after the accident.

X-Q. Two days. All right. Now, Mr. Witness, you said that there was an excavation almost at the Acton line here (indicating)? A. That's correct.

X-Q. And another excavation further down in Acton, is that right? [432] A. That's right.

X-Q. Can you tell the jury approximately how far down in Acton—I'll withdraw that. Can you tell the jury about how far these two excavations were separated, the one in Concord and the one in Acton? A. No, I can't.

X-Q. You're not able to tell us how close to the Acton line the excavation in Concord was, is that right? A. That's right.

X-Q. You can't approximate it, even? Don't go guessing, if you can't. A. To my recollection—no, sir.

X-Q. Now, then, from the excavation to the Chrysler car was how many feet? A. Approximately 70 feet.

X-Q. What was the width of the highway right where the Chrysler car was standing? A. Where the Chrysler car was standing?

X-Q. Yes. A. The width of the three lanes?

X-Q. That's right. A. 30 feet.

X-Q. 30 feet. What was the width of the highway—I'll withdraw that. How much space was there between the Chrysler and the truck? [433] A. About one car length.

X-Q. What do you call a car length? A. The length of an automobile.

X-Q. What do you say it is? A. From the front to the rear.

X-Q. I know that. I got through school some time ago. But how many feet does that mean to you? A. I would say about 8 or 9 feet.

X-Q. All right. So then from the excavation to the truck was about 80 feet, is that right? A. Between 80 and 90 feet.

X-Q. What was the width of the highway there? A. Three lanes, 30 feet.

X-Q. Three lanes, 30 feet. No excavation now any nearer the two cars that I have mentioned than this excavation down here, near the Acton line, that's right, isn't it? A. That's right, sir.

X-Q. Now, the Whitney automobile was separated from the front of the truck, both of them facing the northerly side of the highway, head in, is that right? A. That's right.

X-Q. And they were separated by about 9 inches, you said? A. A few inches.

X-Q. Were you here the first day this case opened? A. I believe I was here the 30th. That was my first day here.

[434] X-Q. Let me ask you this. Do you remember this man addressing the jury after I did, and him saying that he would show the rear end of the Whitney car was up against the fence? A. No, sir.

X-Q. You didn't see the rear end of the Whitney car up against the fence, did you? A. No, sir.

X-Q. No. There is no doubt the front end of the car and the front end of the truck was up against the fence? A. That's right.

X-Q. On the northerly side of the highway? A. That's right.

X-Q. And the highway at that point, where this Whitney

car was, was at least 30 feet wide, wasn't it? A. The highway was 30 feet.

X-Q. And if you go back 50 feet further, or a hundred feet further in the direction of the top of the hill, the highway is 30 feet wide? A. That's right.

Q. And if you go back another hundred feet, the highway is 30 feet wide? A. I believe so.

X-Q. If you go back ever 200 feet more, the highway was 30 feet wide, wasn't it? A. I didn't measure it, but I believe so.

[435] X-Q. So the only excavation that you find between the top of the hill, for 700 feet, at least, from the line, was this excavation right by the line, isn't that right? A. That's the only one I recall.

X-Q. Now I don't want to be too technical. I'm not trying to trap you. But what is the difference between, in your opinion, if you can tell us, between a car that leaves a tire mark on the highway when the load has shifted—you see what I mean—the heavy part of the load is on the wheel and a skid mark?

Mr. Mahony: Objection.

X-Q. (Continuing) If you know?

Mr. Mahony: Objection.

Mr. Prendergast: He has testified in this case that it was a skid mark?

Mr. Mahony: He said a wheel mark.

Mr. Prendergast: No. If you say he didn't say "skid mark", I will withdraw it.

The Witness: I didn't say skid mark.

X-Q. It's a tire mark? A. Tire mark.

X-Q. All right. Let me ask you this: You have been using the term tractor-trailer here, haven't you? A. Tractor-tanker, I believe.

X-Q. What is a tractor-tanker? A. A tractor with a back end used for carrying fuel.

[436] X-Q. This was in a tractor-trailer, was it, or tractor-tanker? A. It was a truck used as—

X-Q. Look. Was it a tractor-tank? That's all I'm asking you. A. It was a truck, yes, a truck with a tank as one unit.

X-Q. Then it wasn't a tractor-tanker, was it? A. It was one unit.

Mr. Mahony: You mean it was a tractor-trailer?

Mr. Prendergast: Look. He has been using the term.

Mr. Mahony: He says it's a single truck with a tank on it.

X-Q. What is a tractor-tanker to you? It's a 2-part car, isn't it, or 2-part motor vehicle? That's a tractor-tanker, isn't it? A. This is a truck with a tank in back of it.

X-Q. A one-bodied motor vehicle? A. That's right.

X-Q. That's not a tractor-tanker, is it? A. It's a tractor with a tank on it.

X-Q. You have said the complete front of the doctor's car was demolished? A. I don't believe I said the front, complete front, but the front end.

X-Q. How much of the front end? A. I would say from three-quarters of the left side, from the left side.

[437] X-Q. Was there a bit of damage, so far as you could observe, on the right front, the extreme right front of that car? A. No, sir.

X-Q. And the picture shows no damage at all to the right front headlight? A. That's right.

X-Q. And I'm showing you Exhibit C. Do you see it? A. Yes, sir.

X-Q. Now did anybody ever tell you that it was the right front of the truck that came in contact with the left front of the automobile?

Mr. Mahony: Objection.

Mr. Prendergast: I will withdraw it.

X-Q. Did any of these three operators tell you at any

time that it was the right front of the defendant's motor vehicle—I mean of the oil truck—that came in contact with the left front of the doctor's car?

Mr. Mahony: Objection. I haven't the slightest objection to anything that Doctor Hobart said, but things not said—.

The Court: Confine it to Doctor Hobart and Mr. Whitney and to—

Mr. Prendergast: He introduced their conversation.

Mr. Mahony: I introduced the conversation in the presence of Mr. O'Brien. Anything with reference to that [438] conversation I haven't the slightest objection to.

X-Q. I will ask you this. Did Doctor Hobart ever tell you that it was the right front of the truck that came in contact with the left front of his car? A. I don't believe so.

X-Q. Now, the Judge asked you the question, whether or not you had talked to Mr. Whitney before you talked to Mr. O'Brien. How did you answer that question?

The Court: I asked him if Mr. Whitney was there at the time.

Mr. Prendergast: I will ask him.

The Court: And he said, Yes.

X-Q. You said you took Mr. Whitney over to Mr. O'Brien, is that right? A. I believe Mr. Whitney accompanied me over.

X-Q. You had already talked with Whitney then, hadn't you? A. I believe so.

X-Q. Yes. And you had gotten Whitney's story as to how the accident happened, in the absence of O'Brien, hadn't you? A. I believe I got part of his story.

X-Q. Part of it? A. I asked him to repeat it in the presence of Mr. O'Brien.

X-Q. To repeat what he had said? A. Yes.

X-Q. There isn't any doubt Mr. Whitney told you the

Hobart car [439] turned to the left, is there? A. Mr. Whitney—

X-Q. Yes. That's right? A. He said the car was forced back to the right side.

X-Q. I didn't ask you that, Mr. Witness. Answer my question, will you? There isn't any doubt, and you referred to the statement, Whitney told you, that the Hobart car turned to the left to avoid the construction? There is no doubt about that, is there? A. I don't believe he used the word "left". I couldn't answer your question.

X-Q. He pulled out? You have told us the road was blocked directly in front of—on the northerly lane there, didn't you? A. Yes, sir.

X-Q. So Whitney told you that to avoid that construction, the Hobart car pulled out? That's right? That's what he told you, didn't he? A. That's right, sir.

X-Q. And he told you that at the scene of the accident, didn't he? A. No, sir. At the hospital.

X-Q. Now that road was posted, wasn't it, for speed? A. I believe it was.

X-Q. It was posted for 45 miles an hour, wasn't it? A. I believe so.

X-Q. Yes. And along the highway there were signs saying, "Use the Middle Lane For Passing Only", that's right, too, isn't it? [440] A. I don't recall that.

X-Q. You don't? Well, will you say there weren't signs along Route 2 saying, "Use Middle Lane"? I mean they were put up by the Public Works—"Use Right Lane For Passing Only"?

Mr. Mahony: Where?

Mr. Prendergast: All the way along, even in Concord. I'll get it down to Concord.

A. I believe there are signs on Route 2.

X-Q. Sure.

Mr. Prendergast: Your Honor, this has not been marked

as an exhibit. I would like to have this letter marked as an exhibit. That is the letter Mr. Mahony was kind enough to read to the jury.

Mr. Mahony: I would assume the same as the hospital report, as part of the hospital reports they haven't been marked as exhibits.

Mr. Prendergast: Well, I am going to ask that it be marked as an exhibit because it is not a hospital report. It is a letter admitting certain conditions that they discovered apparently after our man had left the hospital. I think the jury ought to have it because argument may be made about it.

The Court: Your position, Mr. Mahony, is that it is an addenda to the record?

Mr. Mahony: That's correct, and it ought to go with the record, and all the records go out to the jury room if that [441] goes out.

The Court: This isn't in the form of the hospital record. It's a letter.

Mr. Prendergast: That's right.

The Court: I will admit it as an exhibit.

Mr. Mahony: Beg pardon?

The Court: I will admit it.

Mr. Mahony: Over my exception. All right.

The Clerk: Plaintiff's Exhibit 2.

(Letter dated June 26, 1952, from Emerson Hospital, signed Wilfred W. Forbes, M.D., to Mr. Michael O'Brien, marked Plaintiff's Exhibit No. 2.)

Mr. Prendergast: That's all, Officer.

Mr. Mahony: That's all.

Mr. Prendergast: May we have that report marked for identification?

Mr. Mahony: I am going to offer the report now.

Mr. Prendergast: I will object to that. What are you laughing at? That's admissible.

Mr. Mahony: I suppose your Honor has to pass on it.

Mr. Prendergast: Then don't laugh at me.

Mr. Mahony: You are asking that it be marked for identification?

Mr. Prendergast: That's right.

Mr. Mahony: I am asking that it be marked as an exhibit, counsel for the plaintiff having used it in cross examination of this witness.

[442] Mr. Prendergast: I have the right to use anything that he uses to refresh his recollection from in cross examination, your Honor.

The Court: I will exclude it.

Mr. Mahony: May it be marked for identification?

Mr. Prendergast: Yes. I hope so.

The Clerk: Defendant Hobart's Exhibit D for Identification.

(Police Report of Motor Vehicle Accident, dated June 23, 1952, signed Patrolman Americo G. Sousa, marked Defendant Hobart's Exhibit D for Identification.)

Mr. Mahony: Sergeant Driscoll.

DANIEL F. DRISCOLL, Sworn

Direct Examination by Mr. Mahony

Q. What is your name? A. Daniel F. Driscoll.

Q. Where do you live? A. 248 Main Street, Reading, Mass.

Q. And your occupation? A. Sergeant, Massachusetts State Police.

Q. How long have you been a sergeant? A. I have been a sergeant—I have been a member of the State Police for 13½ years, and I have been a sergeant for the last 5½ years.

Q. And you are stationed where now? A. General Headquarters, 1010 Commonwealth Avenue, Boston.

Q. And on June 21, 1952, where were you stationed? [443] A. I was assigned to our Photography and Fingerprinting Laboratory.

Q. Where was that? A. At 1010 Commonwealth Avenue.

Q. Have you had special training or experience in the matter of photography? A. I was a photographer.

Q. For how long? A. I was a photographer for seven years.

Q. Before you went on the police force? A. No, they trained me. And I also took a course for two years at the Franklin Technical Institute.

Q. On June 21, 1952, were you out at the scene of this accident? A. I was.

Q. What time did you get there? A. I arrived there approximately 20 minutes past 2.

Q. And were the vehicles still there at the time? A. They were.

Q. And did you take some photographs? A. I did.

Q. At that time? A. Yes.

Q. And do you have those photographs with you? A. Yes, I have.

Q. Are these the photographs which were taken that day? [444] A. That's correct.

Q. Eleven photographs, apparently? A. Correct.

Q. Can you tell the Court and jury whether or not they are fair representations of what they purport to show? A. They are.

Mr. Mahony: I am going to offer these.

Mr. Prendergast: Let me see them.

(Mr. Mahony hands group of photographs to Mr. Prendergast.)

Mr. Prendergast: We have no objections to these, Mr. Mahony (handing photographs), but we do object to those. First, why don't we have these marked? I have seven. I ask that they be marked separately.

Mr. Mahony: I offer these seven photographs. I will show them to your Honor first (handing photographs to the Court).

The Clerk: Defendant Hobart's Exhibit E-1 through 7.

The Court: Well, what is the objection to the others?

(Conference at the bench between Court and counsel, as follows:

Mr. Prendergast: First, it is discretionary, and we appreciate that. I would like to call your attention to the fact—well, look at the long straight line they show on the right hand lane, which is illegally there. I don't want the jury [445] to get that kind of picture.

Mr. Mahony: That was on the road that day.

The Court: What line?

Mr. Prendergast: The single line. He will argue we should have stayed to the right of that line. Look at this one. That's not supposed to be there at all.

The Court: Is this the obstruction?

Mr. Mahony: Right here (indicating).

Mr. Prendergast: Look at the line. They say we should have stayed over there.

Mr. Mahony: The fellow from the board didn't know how it was on that particular day. He thought it was the way it was in '51.

The Court: They have to show the conditions at the time of the accident.

Mr. Prendergast: Well, they yell we are violating a statute.

Mr. Mahony: Of course, they're not; these are pictures of the road.

The Court: Only for the purpose of showing the general scene of the accident?

Mr. Mahony: That's right.

Mr. Prendergast: He is going to argue it requires us to stay to the right of that line.

[446] Mr. Mahony: Well, wait a minute.

Mr. Prendergast: He will argue that.

The Court: He hasn't said so.

Mr. Mahony: This fellow thought the road was—he didn't know what it was on June 21st. On June 21st this is the condition of the road. Those are the marks.

The Court: I will allow the photographs to go in as showing the condition of the road at the time. But arguing that the law was violated or not—how could you argue there was any law of the road violated?

Mr. Prendergast: Well, he will introduce that later.

The Court: He can do it without the photographs.

Mr. Mahony: Certainly.

Mr. Prendergast: No, no. He has the obligation of showing those lines were legally

Mr. Mahony: Of course I don't. I am showing what the road showed that day when this accident happened, and that's all.

Mr. Prendergast: If he is going to allege we were violating any rule of the highway, as evidence of contributory negligence—

[447] The Court: You're going to argue the doctor violated a rule—?

Mr. Prendergast: Not a bit. No, I'm not.

The Court: That he wasn't in the exercise of due care?

Mr. Prendergast: I'm going to argue negligence in the way he operated his motor vehicle.

Mr. Mahony: That's all I'm going to argue.

Mr. Prendergast: He'll argue the lines.

Mr. Mahony: No.

Mr. Prendergast: He's going to argue that with a straight line up and down, he'll argue it requires us to keep to the right of it.

Mr. Mahony: I'm going to argue those are the

marks on the roadway which confronted these people at the particular time.

The Court: Are you going to argue that a disregard of these lines constitute a violation?

Mr. Mahony: No. He came over onto the second lane, when he had his third lane completely open, and the accident occurred in our lane, the middle lane.

Mr. Prendergast: If you'll stick to that, I'll have no objection, but if you're going to go ahead and start arguing—"Gentlemen, look at [448] the picture. Look at the straight line. Everybody knows you should stay to the right of a straight line going up and down a hill", then I'll object to it.

Mr. Mahony: If you don't argue this map or this plan as being accurate as to where the marks were, that's all right. What is sauce for the goose is sauce for the gander. We have photographs of the marks.

Mr. Prendergast: I'll not argue anything about lines. I'll simply say that you came over to us and—

The Court: What is this line?

Mr. Mahony: The wheel marks. His position is so absurd, may it please the Court, on this picture here, to expect that that chart on the board represents the lines as they were on June 21st. Here is a picture of the lines as they were on June 21st. What he is kicking about is the transitional line going off west of the line. This fellow has it here 370 feet east, which is not the way it was on June 21st.

Mr. Prendergast: Your picture shows the same line.

Mr. Mahony: If you don't argue this is a [449] correct representation of those lines, I won't argue these lines showing in the photograph. Here is the Concord line. That is as you approach from west into Concord—I mean Acton. This transitional line goes

over to the south side, on the right side, west of the town line. This map has it, on the blackboard, the transitional line 170 to 370 feet east of the line.

The Court: The Public Works Department have plans that show the location, that shows the location of the white lines.

Mr. Prendergast: Do you say this line here (indicating) is that line there (indicating)?

Mr. Mahony: No. I say this line here (indicating) doesn't appear on the blackboard chart.

Mr. Prendergast: That's right.

Mr. Mahony: Well, that's the way it was that day, and the chart isn't the way it was.

Mr. Prendergast: We say it was illegally there.

Mr. Mahony: I am not interested in that. That is the way it was.

The Court: Why do you say that?

Mr. Prendergast: Because we show there was [450] no such line there through this man.

Mr. Mahony: Of course you don't.

Mr. Prendergast: If he's going to claim that we violated.

Mr. Mahony: The picture shows the line was there.

Mr. Prendergast: If he says we violated the line he has to show the line was legally there that we violated. That's what I'm trying to say.

Mr. Mahony: I am offering the picture to show the conditions as they were there.

The Court: I will allow the pictures as showing the conditions without serving as probative value as to the legality of the lines and why they were there.

Mr. Mahony: That's all right.

The Court: I am allowing these photographs in as showing the general condition of the surrounding territory the date of the accident, disregarding entirely

the lines on the highway as having any probative value.

Mr. Mahony: As to the legality—

The Court: As to the legality of the lines, disregarding their legality.

Is that satisfactory to counsel?

[451] Mr. Prendergast: Yes.

The Court: Is that satisfactory?

Mr. Daley: Yes, your Honor.

Mr. Mahony: All right.

The Clerk: Defendant Hobart's Exhibit E 1 - 11.

(Photographs marked Defendant Hobart's Exhibit E-1 - 11.)

(End of conference at the bench.)

Mr. Mahony: The pictures are numbered Exhibit E and run from 1 to 11. The first seven, I think, show the positions of the cars, and then from 8 to 11, they are pictures of the road in the vicinity of the accident (handing photographs to the Foreman of the Jury).

That is all so far as I am concerned, Sergeant.

Mr. Prendergast: We better wait until they look at the pictures before we go on to the cross examination.

The Court: That's right, yes. I am going to suggest to counsel—these photographs are exhibits, and this is a fair rule, and it's the only way to protect both parties, and I'm going to suggest where you have them, I'm going to suggest that you don't consult on them, exchange ideas, because it will foreclose you from having a clear mind. Parties litigant are entitled to have that. I know you won't do that. As these photographs for exhibits go in, hospital records, letters and whatnot, just have them in mind. You can examine them. Each one can assert his or her position when you deliberate. After all, [452] counsel is entitled to argue. Each counsel is entitled to argue his point, the points he feels are salient points that affect the question one way or the other. You will notice I put it so there

can't be any suggestion that I have an opinion, because I haven't. But those fundamental principles are principles that everyone must recognize. There are others I will call your attention to.

Let us take the recess now until quarter-past two.

(Recess.)

[453] AFTERNOON SESSION

Mr. Mahony: Sergeant Driscoll, please.

DANIEL F. DRISCOLL.

Cross Examination by Mr. Prendergast

X-Q. Sergeant, have you still got the negatives of these pictures? A. I have.

X-Q. Are these all the pictures you took? A. No, there are perhaps three more negatives.

X-Q. Where are the rest of them? A. There are perhaps three more negatives that are duplicates of those.

X-Q. There are other pictures, though, aren't there? A. Made from the same set of negatives?

X-Q. I don't know what set, but relating to damage done to cars and locations and things at the scene of the accident which you haven't got here.

Mr. Mahony: You mean more that he took?

Mr. Prendergast: That he took and are not here.

A. No. There were duplicates of those.

X-Q. You showed me a picture at the headquarters, didn't you, in which the wheels of the doctor's car are not shown as they are here? [454] A. That's incorrect. Those eleven photographs are the only ones made up since the time of the accident and the only ones in the original folder and they are the ones I brought with me today.

X-Q. I have been up to the headquarters looking at the pictures, haven't I? A. That's correct.

X-Q. Now, this here is a picture of the location after the cars were removed, is it, and I am now showing you E 11, I think it is. A. That is correct, looking in an easterly direction.

X-Q. Incidentally, you don't know when these various signs were put out? A. I have no idea.

X-Q. Well, all right. We have a mark here shown in that picture, haven't we? A. That's right.

X-Q. We have another mark above that in a sort of a V-shape, haven't we? A. Yes.

X-Q. Which mark, incidentally, is over on the right hand lane of the highway, isn't it? As one looks into the picture? A. It is in the right hand lane going east.

The Court: You are referring to what exhibit now?

Mr. Prendergast: Exhibit 11, Your Honor.

X-Q. And then we have a break in that line and we find another [455] line beginning, then, about at the division between the first and second lane on the right as you go east, which then swings in a curve toward the fence on the northerly side of the street; right? A. That's right.

X-Q. Now, then, there are several other marks in that location aren't there? A. That's correct.

X-Q. There are—what does this mark here represent that I am pointing to now? A. That white mark—

X-Q. Not the white mark. I am directing to this—

Mr. Mahony: May I see it?

Mr. Prendergast: This black area here.

The Witness: Could I see it up close?

X-Q. Sure. See that black area all the way through there? A. That appears to be dust and accumulation of dirt and grit from underneath the Chrysler.

X-Q. Isn't that the location where the Chrysler was when you found it? A. That's correct.

X-Q. With all those marks that big — that square, or whatever you see there, the blurred vision, was that near the rear wheels of the Chrysler before the Chrysler was removed, and under the Chrysler? [456] A. It was underneath the car.

X-Q. Was it under the rear of the Chrysler car? A. No, it doesn't look like it extends to the tire where the car was.

X-Q. Well, there is the picture of the Chrysler in position? A. Yes.

Mr. Mahony: Which number is this?

The Witness: Is that E-1?

Mr. Prendergast: Yes, E-1.

X-Q. Incidentally, this may be a better picture of what I am trying to bring out to you. Exhibit 9. You see the scrapes or scratching or side slewing or slurring beyond the sign there? A. Yes.

X-Q. Now, what does that represent, as you remember it? Not as you interpret the picture but as you remember it, when you took the pictures? A. That was an accumulation of heavy, oily grit that fell down from the underneath part of the car.

X-Q. That is all it is? A. There are some scrape marks there.

X-Q. Tell the Court and Jury what the scrape marks were that were there and in what direction they went? A. They go from south to a northeasterly direction.

X-Q. Are you sure they don't go in an east-west direction? A. No. They go right across. They go from one lane to the [457] other.

X-Q. These two white parts you are pointing to? A. Yes.

X-Q. I am talking about these black marks. Don't they go east and west on the road? A. They cover a portion of the road, so therefore they go from east to west and—

X-Q. North to south, all right. We can't lick you on

that kind of a statement, Now, you notice there are three lines going from the south to the north, aren't there?

The Court: You are referring to which exhibit?

Mr. Prendergast: I am now referring to Exhibit 9.

X-Q. Did you see those three tire marks? A. Three tire marks, and two scrape marks.

X-Q. Three tire marks and two scrape marks, and they are heading right towards the fence, aren't they? A. That's correct, in an arc.

X-Q. Now, you have here in the middle lane some fire marks heading east and west—

Mr. Mahony: Still the same exhibit?

Mr. Prendergast: Still the same exhibit.

X-Q. (Continued) —haven't you? A. Referring to these? Those there?

X-Q. No, I am referring to these right here over my finger. A. I don't believe that is a fire mark right there.

[458] X-Q. You don't believe that is a tire mark? A. No.

X-Q. What do you say that is? A. That is a tire mark.

X-Q. What do you say that is? A. Tire mark.

X-Q. Tire mark? A. Tire mark.

(Mr. Prendergast shows the exhibit to the jury.)

X-Q. Now, there is a shoulder on the southerly side of the road there, isn't there? Maybe we can get a better picture. There is a shoulder on the southerly side of the road, isn't there? A. It looks like it would be about a foot.

X-Q. Did I ask you that? A. Yes.

X-Q. Did I ask you if there was a shoulder one foot wide on the southerly side, or did I ask if there was a shoulder? A. What appears to be a shoulder.

X-Q. You are not interested in the outcome of this case? A. Not one bit.

X-Q. You want to say the width of the shoulder is only one foot; is that what you, as an officer coming in here, unprejudiced, want to tell this jury? A. Yes.

Mr. Prendergast: (To the jury) Please look at that, [459] gentlemen of the jury, what he says is a foot shoulder on the right.

X-Q. Now, while we are at it, will you be kind enough to tell us what, in your opinion, is the space between the two posts, these cement posts on the guard rail? A. I would have to estimate that.

X-Q. Would you say 10 feet is about right? A. Approximately.

X-Q. All right. Now, then, there is no handle on that left door, is there, of the truck? A. No.

X-Q. And there wasn't any handle on the left door of the truck when you arrived and took the picture, was there? A. No.

X-Q. The left fender of the truck is coming away from the front of the truck, isn't it? In that picture there, at least, and that is Exhibit 6? A. Yes. Pulled away.

X-Q. Let me see what this is. Talking about fences, what is this here, on Exhibit 1? A. That is the hood from the Chrysler.

Mr. Prendergast (to the jury): The hood from the Chrysler is over there on the road. That is what he has pictured between the two vehicles.

X-Q. What is this sticking away up in the air? [460] A. That is the fender. The other photograph shows that.

X-Q. I am now showing you Exhibit 2. That is the fender? A. That's correct.

X-Q. Pulled away from the vehicle and sticking up in the air. All right? That is so, isn't it? A. Yes.

X-Q. And that is the position that the fender was in, that left fender, when you got to the scene of the accident and took the pictures; that's right, isn't it? A. Correct.

X-Q. You have no picture showing the fender of that car was driven down against the wheel, or driven in against the engine, have you? A. No, I have not.

X-Q. Now, the picture here of the Whitney car and the truck, one of these pictures here, namely Exhibit No. 5, would seem to indicate, as one looks at it there, that the bumper of the truck is right against the left fender of the Whitney car. That isn't quite so, is it? A. No. The purpose of that—

X-Q. I don't want purpose, but I don't want the jury to be misled. That bumper is not up against the fender of the Whitney car, is it? A. No, it is not.

Mr. Daley: Which one is that?

[461] Mr. Prendergast: Exhibit 5.

X-Q. That is, so that there will be no question about it, the Whitney car, which is Exhibit 5 and is the gray car, to the right of this bumper and apparently looks as though the bumper is up against it, and the bumper of the truck —they are separated? A. Yes, they are.

X-Q. They were separated when you got there. And that is shown by this picture, which is Exhibit 7? A. That's correct.

X-Q. Now, the left front tire of the Whitney car is flat, isn't it? A. Yes, sir.

X-Q. Will you be good enough to tell us what this black line is going across from the truck to the Whitney car? A. I would say that is the edge of the shoulder of the road.

X-Q. It looks the same as this mark here, doesn't it? A. That mark goes all along.

X-Q. That is the shadow of the truck right there, isn't it? A. No, there it is, right there.

X-Q. This here, you have been talking about; all this right over my finger, is the shadow of the truck, isn't it? A. The shadow of the truck is present, yes.

X-Q. Right over my finger. Now, you have a line going right here from the lower part of the picture, swinging around into there, [462] haven't you? If you can see over my— A. Yes.

X-Q. That same thing continues right across over under the passenger car, doesn't it? A. I wouldn't say so.

X-Q. It looks in the picture, doesn't it? A. I don't believe so.

The Court: These questions all are correlated with Exhibit what?

Mr. Prendergast: Exhibit 7, your Honor.

The Court: All right.

Mr. Buzzell: May I interrupt for a moment? We have another doctor here.

The Court: I will be very happy to have you call him.

DANIEL F. DRISCOLL, Resumed.

Cross Examination by Mr. Prendergast, Continued

X-Q. Sergeant, the early part of the cross examination, I was asking about some other pictures, and you said you turned some over to somebody. Who was it? A. Trooper Sousa.

X-Q. In other words, he has got duplicates of all of these? A. He has duplicates; that's right.

X-Q. Let me ask you, have you the film? A. The negatives, I have—

[463] Mr. Prendergast: May we have them marked, your Honor, for identification?

(The witness hands articles to Mr. Prendergast.)

X-Q. The bag is empty? A. That's correct.

X-Q. You might have misplaced—(counting) 16 negatives? A. Correct.

Mr. Mahony: Are you dealing any of those from the bottom? May they be kept in an envelope so they won't be scratched?

Mr. Prendergast: 16 negatives. Will you kindly mark—

(16 negatives marked Plaintiff O'Brien's Exhibit No. 5 for Identification.)

Mr. Prendergast: Please make a note outside, 16 negatives, so I won't be blamed for getting rid of some of them. I don't think Mr. Mahony will object to this. It is clearly evident that this "Drive Slow" sign wasn't at that spot when the accident occurred.

Mr. Mahony: Well, he doesn't know.

The Witness: I have no idea.

Mr. Prendergast: Well— (Conferring with Mr. Mahony.)

X-Q. Now, you said the shoulder on the right was only one foot. Take a look at the people standing in the shoulder and tell us now how wide you think it is? [464] A. Well, if it is an interpretation—the gravel of the grass to the fence? For one interpretation of what the shoulder of the road is.

X-Q. Do you mean you want a technical wording by me as to what I mean by the word "shoulder"? Is that what you mean by that? A. I said the shoulder was approximately one foot wide.

X-Q. Then let me be specific. What would you say was the distance between the guard rail and the edge of the road? A. Approximately three feet.

X-Q. Now, is that the fender that is on the ground, of Doctor Hobart's car, or is it the hood, to the best of your knowledge? A. The hood, to the best of my knowledge.

X-Q. Have you any pictures showing the complete left side of the doctor's car? A. I would have to look at the negatives. I have no photographs.

X-Q. I show you Exhibit 7. What is this right at the back of the wheel of the truck, laying on the ground? A. I believe a piece of chrome.

X-Q. Can you see, by looking at the Whitney car, which car it came off of? A. There is a piece missing from the left front door of the Whitney car.

X-Q. That is that piece right there? [465] A. Yes.

Mr. Prendergast (to the jury): Right underneath the tire you will see the chrome and on the door of the Whitney car you will see it apparently came from there.

I guess that's all.

Mr. Mahony: Mr. Byron.

Mr. Prendergast: Wait a minute, please.

X-Q. Take these films and tell us which ones have been developed and which ones haven't.

Mr. Mahony: You mean which ones have been printed?

X-Q. Printed. A. (Examining)

X-Q. Tell me which is which, as you lay them down. A. These are made up. (Examining.)

Mr. Mahony: May it please the Court, I will be glad to ask the sergeant to have copies made up of anything that hasn't been printed.

The Court: I was going to suggest that, if you wanted it. Mr. Mahony says he will be very happy to have the sergeant make up copies of photographs which have not been made from the negatives.

Mr. Prendergast: Mr. Prendergast might have an idea of his own, too, Your Honor. Ever think of that?

X-Q. Those have been made up, and has that been made up? A. Yes, sir.

[466] X-Q. Which one is which? This one was made up, was it? A. Yes.

X-Q. You have ten now that have been made up. There are eleven pictures, I think, in the exhibit. A. (Pause.)

X-Q. That is partially made up. These haven't been made up, have they? A. There is another one.

X-Q. It is the complete left side of the plaintiff's car, isn't it? A. I think that is almost at the same angle.

X-Q. I didn't say that. That picture isn't made up, is it? A. No.

X-Q. And it shows the complete side of the—the complete left side of the plaintiff's car, doesn't it? I mean of

Doctor Hobart's ear; put it that way. A. It shows more of it than this photograph.

X-Q. You think that these five haven't been printed? A. That is correct.

Mr. Prendergast: I won't scratch them; Mr. Mahony says don't scratch them. I guess that's all.

Mr. Mahony: May I ask the Court's indulgence to have these five films taken by the sergeant and prints made up of them tomorrow?

The Court: I don't suppose the Court has any control [467] over that.

Mr. Mahony: They are offered for exhibits.

The Court: No, only for identification.

Mr. Mahony: Then, if they are in my control—

Mr. Prendergast: When I have them marked, they are in my control.

The Court: They are in the Court's control. They are marked for identification purposes and they are held by the Clerk.

Mr. Prendergast: All right, then. We can perhaps straighten that out after the jury adjourns.

Mr. Mahony: If any comment is going to be made, I would prefer to have copies made.

Mr. Prendergast: I said I would take it up after we have adjourned.

Mr. Mahony: The sergeant is going along.

Mr. Prendergast: He isn't going to run away, in one minute. Or, is he one of those 4 o'clock fellows?

The Court: I think I will let you go along, with the same admonition, and, God willing, I will see you tomorrow morning, at 10 o'clock.

(Adjournment.)

[468] SIXTH DAY

Court Room No. 5
Federal Building, Boston
December 7th, 1955

DANIEL F. DRISCOLL, Resumed

Redirect Examination by Mr. Mahony.

Q. Sergeant Driscoll, have you made prints of the five films—

Mr. Prendergast: Just so the record will show, I had not finished my cross examination. It is all right, go ahead, I don't mind being interrupted.

Mr. Mahony: I beg your pardon, you had, and I had called Officer Byron and we suspended. Am I right?

Mr. Prendergast: He was on the stand, the last of the pictures.

Mr. Mahony: Go ahead.

The Court: All right, you may go ahead.

Mr. Prendergast: Go ahead yourself, I don't want the record—

The Court: You want to resume your recross examination?

Mr. Prendergast: That is right.

Q. Have you made prints of the five films that were not printed before? A. I have.

Q. Have you those with you? [469] A. I have.

Q. Are those the positive prints from those negatives? A. That is correct.

Mr. Mahony: I offer those.

Mr. Prendergast: I think we had one of those.

Mr. Mahony: That is what the Sergeant said, they are pretty much duplicates of those already in.

Mr. Prendergast: Oh, no, there were some that were not duplicates of those already in.

Mr. Mahony: Tell me those you don't want in.

Mr. Prendergast: I am not arguing the matter, don't misquote him or me. If that has not been in, it is all right with me that it go in.

(Mr. Prendergast examines photographs.)

All right.

Mr. Mahony: May that be marked the same exhibit number?

Mr. Prendergast: What is written on the back?

Mr. Mahony: "Commonwealth of Massachusetts, Department of Public Safety, Division of Police, Bureau of Photography, 6/21/52, D. F. Driscoll."

It is the same, I think, as the others. May these be marked in succession—

Mr. Prendergast: No.

Mr. Mahony: No. 12 to 16.

(Photographs marked Defendant Hobart's Exhibits 12, 13, 14, 15, 16, in evidence.)

[470] Mr. Mahony: I am returning the films to the Clerk.

The Court: Do you need those films now marked for identification, with the photographs?

Mr. Prendergast: No, Your Honor, he can have the films back, as far as I am concerned.

The Court: I think Sergeant Driscoll would like to have them back.

Mr. Prendergast: I would like to keep them separate until I get through with the examination, then he may have them. He can have those they took, Mr. Mahony, if you want; I am talking about the ones I took out of here.

(Discussion off the record.)

Recross Examination by Mr. Prendergast

X-Q. Those are an enlargement of the negative? A. Yes, an 8 By 10.

X-Q. That is an 8 by 10 enlargement, all right. Inci-

dentally, were you there when these cars were removed from the scene of the accident? A. Yes.

X-Q. Did you know that one had to be towed away? A. I don't recall.

X-Q. Do you know that the front left wheels of the truck were locked? A. No, I did not know.

X-Q. And this is the damage to the front left side of the truck, [471] as shown in Exhibit 12, right? A. Yes.

The Court: Go right along.

X-Q. Now where are those negatives that I had? I suppose the larger the picture, the more true the representation? A. No.

X-Q. It shows it much plainer, doesn't it; it shows the contents of the negative much plainer than a small picture? A. A photograph is apt to get more grainy.

X-Q. What has the graininess got to do with it? A. The more grain, the larger you blow it up, the more distortion will be in it.

X-Q. Do you see any distortion in this picture? A. I haven't seen it. (The witness then examines the photograph) Could I see the other photograph, the 8 by 10?

X-Q. Let's see the picture, so he can pick out—first, before we go any farther, let me ask you this, where is the negative? Here you are here. Will you find the negative of this picture, enlarged picture that is in front of you? (The witness does so.) Is that it? A. Yes, sir.

X-Q. Is the picture that is now in front of you a fair representation of the contents of this negative that I have in my hand? A. Yes, it is.

Mr. Prendergast: Then I ask it be marked as an exhibit.

[472] Mr. Mahony: That is a copy?

Mr. Prendergast: I will show you the negative, Mr. Mahony. What exhibit is it?

The Witness: E-7.

Mr. Prendergast: It is an enlargement of E-7.

(Photograph marked Plaintiff O'Brien's Exhibit No. 4 in evidence.)

Mr. Prendergast: I am going to suggest something to you if I may. You mark also the front of it, so that when we put it on the board, if there is any reference to it, we want to know what exhibit we are talking about.

The Court: All right.

Mr. Prendergast: You can write it, we will see it, on the bumper of the Whitney car, I think it would be better, it is white, then we can see it.

(Mr. Prendergast shows the photograph to the Jury.)

Mr. Prendergast: You will have these pictures out in the jury room with you.

X-Q. Now, Sergeant, will you kindly pick out the negative? [The witness does so.]

X-Q. Do you think that is it? A. Oh, yes.

X-Q. Have you got the negative? A. Yes.

Mr. Prendergast: The next picture, Mr. Mahony, is an enlargement of E-2.

[473] X-Q. Now does this enlarged picture in front of you now, is this a fair representation of the contents contained in this negative from which E-2 was developed, was printed? A. Yes.

Mr. Prendergast: All right.

[Photograph marked Plaintiff O'Brien's Exhibit 5.]

Mr. Mahony: Could you put them up with the left side pinned together, like an album, so you can leaf them over?

Mr. Prendergast: I don't think you can do it, but I will follow, as nearly as I can, your suggestions.

[Mr. Prendergast shows Jury the photograph, O'Brien's Exhibit 5.]

X-Q. Now, Sergeant, will you kindly get us the negative that is an enlargement of this?

The Court: Does counsel expect any more medical testimony?

Mr. Mahony: Yes, we have the radiologist coming this afternoon.

The Court: Because I have a matter I have to take up at half past 12. I will be tied up to quarter-past 1, 10 minutes after 1, at least. I am going to have the Jury go at 25 minutes after 12. I won't take any recess. I will try to get back about 10 minutes after 2. I want to see if I can make the time up.

Mr. Prendergast: Exhibit 10, Mr. Mahony.

Mr. Mahony: Thank you.

[474] X-Q. Now, Mr. Witness, is the picture, the enlargement in front of you now, a fair representation of the contents of the negative from which Exhibit 10 was printed? A. It is.

[Photograph marked Plaintiff O'Brien's Exhibit 6 in evidence.]

[Mr. Prendergast shows the Jury Plaintiff O'Brien's Exhibit 6.]

X-Q. Will you be kind enough to get the print which serves as the basis for this enlargement, Sergeant? [The witness does so.] Is the picture in front of you, the enlargement in front of you, a fair representation of the contents of the negative from which Exhibit 8 was developed? A. It is.

Mr. Prendergast: Thank you.

[Photograph marked Plaintiff O'Brien's Exhibit 7 in evidence and shown to the Jury by Mr. Prendergast.]

Mr. Mahony: That is looking east?

Mr. Prendergast: Yes, looking east.

X-Q. Sergeant, will you kindly get the negative from which this picture was printed? [The witness does so.] What exhibit is it? A. 9.

Mr. Prendergast: Mr. Mahony, this is Exhibit 9.

X Q. Is the picture, the enlargement in front of you now, a fair representation of the contents of the negative that I have in my [475] hand, from which Exhibit 7 was printed? A: It is.

[Photograph marked Plaintiff O'Brien's Exhibit 8 in evidence and shown to the Jury by Mr. Prendergast.]

Mr. Mahony: Is this looking west?

Mr. Prendergast: This is looking west, yes.

The Court: How many more?

Mr. Prendergast: One.

X Q. Now, Sergeant, let me ask you to get the negative from which this picture was printed. [The witness does so.]

Mr. Prendergast: Mr. Mahony, he says it is Exhibit 11.

X Q. Now, Sergeant, is this picture that is in front of you now a fair representation of the contents of the negative from which Exhibit 11 was developed? A. It is.

Mr. Prendergast: Thank you.

[Photograph marked Plaintiff O'Brien's Exhibit 9 and shown to the Jury by Mr. Prendergast.]

X Q. Now before I hang this up [on the blackboard], I want to ask you two or three questions. Will you come down?

Mr. Prendergast: Will you kindly stand up here, Mr. Nitkin? You hold it, if you don't mind.

X Q. Sergeant, this here [pointing] on Exhibit 9, now Plaintiff's Exhibit 9, is a tire mark?

Mr. Mahony: I am sure the Jury cannot see it.

[476] Mr. Prendergast: On account of the light?

X Q. This, I am pointing out to you here, is a V-shaped tire mark, evidently made by a tire.

X Q. It is entirely on the right hand side of the road, as one goes in an easterly direction, isn't it, from here to here [pointing]? A. On the right hand side of the road.

X-Q. As one goes easterly, going towards Concord, that is right, isn't it? A. It is in the right hand lane.

X-Q. All right. Now we have, in a westerly direction, from that mark I have just pointed out, another large mark on the right hand side of the highway, as one goes in an easterly direction, which I am pointing out to you; that is right, isn't it? A. Yes.

X-Q. And we have here another tire mark going north and south, across what appears to be a white line, and aiming for the end of that mark I have just pointed out to you, haven't we? A. It is a mark there.

X-Q. It is a tire mark? A. I could not say it was a tire mark.

X-Q. You can tell us every other mark on there is a tire mark. You cannot tell us whether that one is a tire mark or not? A. No. I can say those others, those are tire marks.

X-Q. You can see that is a tire mark? [477] A. Yes.

X-Q. You can see these are tire marks? A. No, I cannot see these.

X-Q. Can you see these? A. No, sir.

X-Q. Can you say that is? A. No, sir.

X-Q. Can you say that is? A. No, sir.

X-Q. Can you say that is? A. Yes, sir.

X-Q. Can you say that is? A. Yes, sir.

X-Q. Can you say that is? A. Yes, sir.

X-Q. Can you say that is? A. Yes, sir.

X-Q. You cannot tell us what that mark across that line, going in a north-south direction, is? A. No, sir.

Mr. Prendergast: Let me, let the Jury see it close. The mark I want to call to your specific attention is this, this mark right here [pointing and showing to the Jury]. The mark which I want to call to your attention is this mark right here.

[478] [Six large photographs now on the blackboard.]

Mr. Prendergast: Your witness, Mr. Mahony.

Mr. Mahony: Have you given him back all his films now?

The Witness: Yes, sir, I have them all.

Mr. Prendergast: Wait a minute, can you point out to the Jury on any exhibit that you have, a mark made on the highway, a double mark made on the highway by dual tires, as of tires similar to what are on the rear wheels of the truck?

Mr. Mahony: Objection.

The Court: I will admit it.

Mr. Mahony: The photographs speak for themselves.

The Court: That is right, but I mean, he is qualified as an expert. If he is qualified as an expert, I have no doubt he is, I will say he is, the responsibility for saying whether a person is an expert, especially qualified in his particular line of endeavor, is the Court's, then he becomes a witness just like any other witness, you have a right to accept any part of his testimony, accept all of it, reject all of it, the weight of it is for you.

Mr. Prendergast: Withdraw the question, for a minute.

X Q. (By Mr. Prendergast) Look at the rear dual wheels on the truck? A. Yes.

X Q. They are perhaps 6-inch tires, across that is, about [479] 6 inches of each tire mark would strike the ground? A. Yes, sir, at least.

X Q. At least: There may be, let us say, a couple of inches space in between, maybe a little more, whatever you say, I don't know, but there is a space in between the two tires? A. That is correct.

Mr. Prendergast: I wonder if we have a better picture there. Let me see the rest. I think this one, that is not a bad picture of the rear wheel, is it? A. No, sir.

X-Q. It is a picture of the rear right dual wheel, as you can see there on the truck [showing photograph to the Jury.]

Mr. Prendergast: You might, some of you might be able to get a better view of it if you look down here, right in there [pointing to photograph on the blackboard].

X-Q. Now let me start off again; have you any picture showing marks of any kind leading to the rear right or rear left wheel of the oil truck? A. Leading to the—

X-Q. Yes. A. No.

X-Q. No.

The Court: What time did you go there?

The Witness: I was there approximately 30, 40 minutes after the accident, sir.

[480] Mr. Prendergast: All right, I guess that is all.

The Court: When you arrived, the cars were still there?

The Witness: Yes, sir, as the photographs show.

The Court: That is right.

Redirect Examination by Mr. Mahony

Q. Sergeant, the mark which you referred to and testified to as leading to the right front wheel of the truck, that wheel wasn't a dual wheel but a single wheel? A. That is correct.

Mr. Mahony: That is all.

Recross Examination by Mr. Prendergast

X-Q. Well now, step over here, Sergeant, and see whether that mark does lead to that wheel or not. Step over there [to the blackboard], get a good close examination of it and see whether that mark actually leads to that wheel, or if it isn't a fact that wheel is out here and the mark is in here?

Mr. Mahony: On the shoulder.

Mr. Prendergast: He can understand what I am asking. Come over here and see.

The Witness: I can see it from the other photographs.

X-Q. Isn't it a fact the mark comes in to here, my finger is right on it? A. There is a short distance between the marks.

Mr. Prendergast: I am not asking about the short distance.

[481] X-Q. My finger is right on the mark. A. In the middle of the mark.

X-Q. That wheel is in that direction, my finger is in now, isn't it? A. It is pointing directly in, yes, sir.

X-Q. The wheel is pointing directly in, but it is pointing towards the rear of this car, in that direction, isn't it? A. Yes, it is.

Mr. Prendergast: That is all.

Mr. Mahony: That is all, Sergeant.

The Court: Sergeant, you can take your negatives and preserve those.

The Witness: Yes, sir.

EDWARD G. BYRON, Sworn

Direct Examination by Mr. Mahony

Q. What is your name? A. Edward G. Byron.

Q. Where do you live? A. 3 Center Street, Waltham.

Q. Are you a State police officer? A. Yes, sir.

Q. And have been, for how long? A. 8 years.

Q. And you are now connected with what barracks? A. The State police barracks at West Concord.

[482] Q. On June 21, 1952, you were connected with the same barracks? A. Yes, sir.

Q. On that date did you go to the scene of this accident we have been discussing? A. Yes, sir.

Q. Alone or with someone? A. I, as a result of a radio call, I arrived there, approximately 1:50 or 1:55. I was alone in my own cruiser.

Q. Was Officer Sousa there by then? A. Yes, sir.

Q. He was already there. Did your picture appear in any one of those? A. Yes, it does.

Q. Did you have any discussions with any of the parties involved in the case? A. No, sir. I arrived after they had left the scene.

Q. Were the vehicles still there when you got there? A. Yes, sir.

Q. In the positions as shown in the photographs? A. Yes, sir.

Q. And what did you do after you got there? A. I assisted Trooper Sousa in measuring the road and also the tire marks on the road, and directing traffic at the scene, until the vehicles were removed.

Q. Were any of the signs which appear on the photographs moved [483] at all after you got there? A. No, sir.

Q. They were there when you got there? A. Yes, sir.

Q. Did you make any measurements, or make any memoranda of measurements made by anybody else? A. No. I assisted Trooper Sousa with the tape in measuring the roadway and the tire marks.

Q. But he made the measurements? A. Yes, sir.

Cross Examination by Mr. Prendergast

X-Q. Did you assist Officer Sousa when he tested the brakes on the truck? A. No, sir.

X-Q. Did you see him test the brakes on the truck? A. I don't recall whether I saw him or whether I did not.

X-Q. Did you test the brakes on any vehicle there? A. No, sir.

X-Q. Take a look at that and see if that top line there, see what it says and see if that won't refresh your recol-

lection as to whether or not you saw Officer Sousa test the brakes on the truck? A. No, I don't.

X-Q. You don't. What did Officer Sousa do while you were there other than partake in the measurements that you have described? [484] What did you see him do, if anything? A. I don't recall what he did. I assisted handling the traffic. As far as the investigation of the accident, the only thing I assisted him on was the tape on the road.

X-Q. Now you don't know where the signs were at the time the accident happened, do you? A. Not at the time the accident happened, no.

X-Q. I wonder if you can help us in this respect, assume a line was drawn across the road, north and south, you follow what I am saying? A. Yes.

Mr. Prendergast: I will withdraw that. Perhaps I better go back for a minute.

X-Q. Will you come and point out to the Jury what particular end of the lines you measured, that is the best thing to start off with, I think. If you remember. If you don't, it is all right to say you don't. A. I measured the width of the road. What location on the road, I don't know.

X-Q. You don't remember? A. It was in the vicinity of the accident.

X-Q. The road is substantially the same distance for width all the way up and down the hill, about 30 feet wide, isn't it? A. I would say so.

X-Q. Did you measure any lines, any tire marks, on the road? [485] A. Yes, sir.

X-Q. Will you point out to the Jury what tire marks you measured? A. I measured the starting point, right here at the right wheel of the truck back to the end of the tire mark.

X-Q. Show us back to the end, of where? A. It came along here.

X-Q. Down there? A. It is broken front here, two of them and a solid one, right to the rear.

X-Q. Now then, stand over there. Maybe you can help us. You say you measured this mark here, right? A. Measured from here along to the end of this one.

X-Q. Didn't you measure each individual mark? A. No, sir.

X-Q. Didn't you measure the break in between each individual mark? A. No, sir.

X-Q. Did you measure this mark that is here, right across, that white line, that mark right there? A. I could not say that it was a definite mark of anything.

X-Q. I didn't ask you whether you could say it was or wasn't. The Jury can tell whether it is or isn't. So can I. I am simply asking if you measured what I pointed out to you. A. No, sir.

[486] X-Q. That is a simple question, all right. Now, drawing a line across the road, north and south, from that point right there, do you follow me now, and drawing a line across the road to this point where the alleged mark was, as you people say, to the right of the wheel, what would you say would be the distance between those two lines on the road? A. I don't understand the distance. What do you mean by the question, the distance?

X-Q. Stand over there, please, so the Jury can see what I mean. Assume you drew a line across the highway, right from where you say you began your measurements? A. Three lines.

X-Q. Across the three lines. Then assume you drew another line across the three lines here, where you say the mark ended up. What would be the distance between those two lines, measuring between the lines, on the highway? A. I have no idea.

X-Q. That is all, thank you. So there will be no doubt about this later, the 90-foot measurement you speak about

included the breaks in the highway, didn't it? A. Yes, sir.

X-Q. It included these spaces that were free of any marks on the highway, that is so, isn't it? A. Yes, sir.

X-Q. Can you tell the Jury the width of those spaces that have [487] no mark on them? A. No, sir.

Mr. Prendergast: That is all.

Mr. Mahony: That is all. Mr. Robinson, of Concord.

JOHN H. ROBINSON, Sworn

Direct Examination by Mr. Mahony

Q. What is your name? A. John H. Robinson.

Q. Where do you live? A. 31 Monument Street, Concord, Massachusetts.

Q. What is your occupation? A. Superintendent of the Concord Water and Sewer Department.

Q. And you have been holding that position for how long? A. 17 years.

Q. And in—

The Court: You have no sewer connection up there; there is no Sewer Department in Concord, is there?

The Witness: Yes, sir.

The Court: They are cesspools.

The Witness: A major portion of the town is covered by a public sanitary sewer.

The Court: That is right. They empty into cesspools in the town.

The Witness: No, sir.

The Court: Have you a connection with the Metropolitan [488] sewerage system?

The Witness: We have our own disposal system, consisting of natural sand filters.

The Court: They are cesspools.

The Witness: No, sir. It is considered a public sanitary sewer.

The Court: I don't doubt that.

The Witness: No, it is not.

The Court: I don't doubt that at all.

The Witness: It is a sewer system. The outlying areas—

The Court: It does not connect with Metropolitan?

The Witness: It does not.

Q. Does it end up in what is called sewer beds, flats in which the water is aerated? A. Yes, it does.

The Court: I am not underestimating the importance of the service at all, in any way. It is more valuable than the mechanical devices in Metropolitan? A. Like all they had in Natick, before they built that new commercial center.

Mr. Prendergast: We will be all over the United States.

Mr. Mahony: Strike it out.

The Court: Like the Cape?

[489] The Witness: It is a modern up-to-date sewer system.

Mr. Daley: I object.

Q. Did the Town of Concord do any of the work in the area that we have been discussing here in June, 1952, along this Route 2 near the Concord-Acton line? A. Yes, sir.

Q. Was a permit secured from the Public Works Department with reference to that? A. Yes, sir.

Q. Here is a certified copy of the permit—

Mr. Prendergast: I have no objection, go ahead. Let me see the contents. I don't deny there was a permit.

Mr. Daley: I have no objection.

[Permit, Commonwealth of Massachusetts, Department of Public Works, marked Defendant Hobart's Exhibit F.]

Mr. Mahony: This is a permit. I will just read part of it at the present time. "No. F-4978. Commonwealth of Massachusetts, Department of Public Works, Concord-

Acton, permit. Subject to all of the terms, conditions and restrictions printed over, in and below and on the reverse side hereof, permission is hereby granted to the Town of Concord, Sewer and Water Department, to open the street highway in the Towns of Concord and Acton, known as Route 2, for the purpose of cleaning and relining the existing water main, on the northeast of the road, between Stations 0 and 27 plus 01 in Concord, and between Stations 0 and [490] 99 plus 46 in Acton."

"Attention is called to the clauses on the back of the permit relating to the laying of pipe. "Necessary barriers and signs shall be installed by the grantee. If snow and ice conditions exist during the progress of the work, the grantee shall keep the highway well sanded to a point not more than 200 feet beyond the barriers and signs."

Mr. Prendergast: Let me see that a minute.

Q. Now, Mr. Robinson, can you tell us, in June, particularly around June 21st, what if any barriers or markings were on the road a quarter of a mile east of the town line of Concord and Acton, and a quarter of a mile west of the town line?

Mr. Prendergast: Which he knows of his own knowledge.

Q. Were you there as the work was progressing? A. Yes, sir.

Q. How frequently were you there? A. Daily.

Q. Now around June 21st, on June 21, 1952, can you tell us what barriers—

Mr. Prendergast: Go ahead.

Q. What barriers or markings there were a quarter of a mile east of the town line and a quarter of a mile west of the town line?

Mr. Prendergast: I object. I don't object to this gentleman telling us what was there on the date of the accident—

[491] on the date of the accident, at the time of the accident.

The Court: Why is that so?

Mr. Mahony: I thought my question was on June 21st.

The Court: Around.

Mr. Mahony: On June 21st, 1952.

Mr. Prendergast: Around 1 o'clock.

Mr. Mahony: The accident happened shortly after 1 o'clock.

The Witness: Well—

Mr. Daley: I am going to make an objection consistent with what Mr. Prendergast said, namely, this, there isn't enough, I submit, information and evidence that on June 21st at some unidentified hour, signs were or were not present. Before this testimony is competent, this witness should be able to tell of his own knowledge when this accident happened, at that hour of the day.

The Court: That is what you mean?

Mr. Mahony: Or shortly before.

Mr. Prendergast: Tell us when he was there, first.

Q. Can you tell us what times you were there, June 21st? A. This was a contract job.

Mr. Prendergast: No, please.

The Court: What time were you there?

The Witness: I was there following the accident.

Q. When were you there last prior to the accident, on that [492] date? A. The day before, at 4:30 in the afternoon.

Q. Was there any work done on the day of the accident, in the morning?

Mr. Prendergast: Wait, he does not know, except what somebody told him. He was not there.

Q. Was it under your supervision, that work?

Mr. Prendergast: Was it what?

The Witness: Yes, it was; they did not work on that date.

Mr. Prendergast: May that be stricken out?

The Court: I will let it stand. You may cross examine. He said he was in charge.

Mr. Mahony: Under his supervision?

Mr. Prendergast: If he is not there to see of his own personal knowledge.

[Discussion off the record.]

Q. June 21st is what day of the week, a Saturday, was it? A. I could not tell you, sir.

The Court: The evidence has gone in, it was a Saturday.

Mr. Prendergast: It was a Saturday?

The Court: That is right.

Q. You say there was no work down there that Saturday morning? A. Right.

[493] Q. The signs that were there at half-past four the afternoon were what?

Mr. Prendergast: Objection. Don't answer, Mr. Robinson.

The Court: I think I will exclude that, Mr. Mahony.

Mr. Mahony: May I make an offer of proof?

The Court: Oh certainly, come up.

[Conference at the Bench as follows:]

The Court: Go ahead.

Mr. Mahony: This is what I offer to prove through this witness. Now, you tell where the signs were at 4:30 Friday night, what the signs and barriers were. To the witness.

The Witness: Around all the holes, there were horses.

The Court: What?

The Witness: At holes there were horses and there were signs such as you see on the board there now, in front, and they were on all sides of the road.

Q. Signs that were indicated in the exhibits entered there? A. Yes.

Q. Now when you got there June 21st, following the accident, were the signs in the same place? [494] A. To the best of my knowledge and belief, they were.

Mr. Prendergast: Of your own—

The Court: He cannot say that. I will tell you what I will do, I will permit this testimony to go in at half-past four. It will be for the Jury to say. I don't think I would permit him to testify they were the same, unless he saw them that day. He said he didn't see them until after the accident. The last time he saw them was half-past four, and then after the accident.

Mr. Mahony: Suppose they were in the same place after the accident?

Mr. Prendergast: He does not know, to the best of his knowledge.

Mr. Mahony: It is a presumption they continued—

Mr. Prendergast: My rights will be saved?

The Court: That is right. I will permit him to testify to that, I will save your rights.

Mr. Daley: There was a presumption they stayed in the same place?

The Court: There is no presumption. I admit it for whatever weight the Jury cares to attach to it.

Mr. Daley: You are getting it in, whether [495] they like it or not.

The Court: Within a reasonable period.

Mr. Daley: 24 hours.

The Court: I am not going to pass.

Mr. Prendergast: Almost 22 hours. Rowdies could come along, cars could come along, knock them all over the joint.

The Court: You can argue on it.

[End of Bench conference.]

Q. When you were there on this road, Route No. 2, at the scene of the accident, on Friday at 4:30, that is the day before the accident, 4:30 in the afternoon, what markings or barriers were in the area a quarter of a mile east? Let us take it one-eighth of a mile east of the town line and one-eighth of a mile west.

Mr. Prendergast: Objection.

Mr. Daley: My objection.

The Court: Yes.

Mr. Daley: Exception.

The Court: Yes.

Mr. Mahony: All right.

The Witness: There were barriers around the holes.

Q. What kind of barriers? A. Wooden horses.

Mr. Prendergast: What holes are you talking about?

Mr. Mahony: Go ahead.

[496] The Witness: Four holes.

Q. Where were the holes? A. In the hard surface, barriers were around, horses were in front of it, similar to the signs you see indicated there.

Q. Was there one hole near the pile of dirt shown here, near the Concord-Acton line? A. That is correct.

Q. Now going east towards Concord, where was the next hole? A. (Witness consulting paper) It would be at Station 4 plus 77, State highway plan, or it would be 454 feet east of that hole.

Q. Now the next hole, moving east, was where? A. 503 feet. It would be at Station 9 plus 80.

Q. From that second hole? A. Right.

Q. Was the other hole in Acton, or still in Concord? A. You mean holes in Acton?

Q. Where were they with reference to the town line? A. The first one in Acton would be at Station 2 plus 50, which puts it 473 feet.

Q. From the town line? A. From the town line, it would be 450 feet.

Q. 450 feet into Acton. A. Into Acton.

Q. The next hole west of that in Acton was what? A. 553 feet, Station 10 plus 503.

[497] Q. At 4:30 o'clock on Friday, what were the barriers you said were around the holes?

Mr. Prendergast: Wait a minute, objection again.

The Court: May I have the question?

Mr. Prendergast: It is the same question.

Mr. Mahony: It is the same question.

Mr. Prendergast: I want my rights saved.

The Court: Yes.

Q. What are the markings of the barriers? You said wooden horses, I think. A. Wooden horses.

Q. Where were they put? A. They were around the holes themselves and out in front of the holes were the signs such as you see in the photographs.

Q. "Danger", "Drive Slow." A. Yes. "Road closed."

Mr. Prendergast: Road closed?

The Witness: Any number.

Q. Along that strip, where these holes were? A. Right.

Q. When you went there the next day, Saturday, June 21st, what time did you get there? A. Just as they were hauling the cars away.

Q. So that you were there before the vehicles were removed from the scene of the accident? [498] A. They were in the process of removing them when I arrived.

Q. What were the barriers, the markings around there at that time?

Mr. Prendergast: Objection.

The Court: I will allow it.

Mr. Prendergast: Exception.

The Court: Rights saved.

The Witness: The horses were there and signs.

The Court: I am permitting counsel full cross examination.

Mr. Prendergast: Irrespective of that, I still want my rights saved.

Q. The horses were there? A. Right.

Q. The signs were there? A. They were there.

Q. The same as they were at 4:30 at night?

Mr. Prendergast: Let him do the testifying, please.

Q. Was there any change you saw in the position of the signs from what it was all through? A. Not that I could testify to.

Q. Now these holes you have referred to, let us fix those. Were they in the northerly or westerly line, or were they in the shoulder of the road north of that lane? A. They would be in the northerly lane, in the westerly lane.

[499] Q. In the hard surface lane for westbound traffic? A. That is correct.

Q. Were these holes right up to the northerly edge of that westbound lane or not? A. No, sir, they were not.

Q. How far from the northerly edge of the westbound lane were the holes? A. I would estimate, 3 feet.

Q. And then they went across the line in the north-south direction? A. Right.

Q. How long would be the hole from where you said it started, 3 feet from the northerly side; what would be the distance across that lane that the holes would extend? A. It would go over to the fence, in most cases.

Q. And as to the northerly line, what would be the distance? Do you understand what I mean by the length of the hole? A. Yes.

Q. This is the northerly end of the hole, 3 feet from the side of the road. Now how long would that hole be?

Mr. Prendergast: Into what? Into what lane?

Mr. Mahony: Into the lane.

Mr. Prendergast: He has already said 3 feet.

Mr. Mahony: I understood him to say it began 3 feet.

Mr. Prendergast: I think he said it went into it, [500] 3 feet.

Q. Having in mind the northerly end of the westbound lane, you have that in mind—

The Court: Do you mean not the soft shoulder?

Q. The northerly edge of the northbound lane, hard packed road. A. Right.

Q. Would the hole begin at that northerly edge of the northbound lane? A. I would say it began at the fence. Just how far was the fence from the north edge of the westbound lane?

The Court: When you say it began at the fence, you mean, on the soft shoulder?

The Witness: That is right. I mean it came over to about 3 feet.

Q. On this photograph here, Exhibit 7, Plaintiff O'Brien, this shows the north side of the road, of the westbound lane, nearest the sign that says "Entering Concord"? A. Right.

Q. Now, did the hole in this area go up to the fence? A. I would say it was about 2 feet off the fence.

Q. 2 feet from the fence? A. Right.

Q. How wide would you say the shoulder was from the fence to the edge of the hard packed road? [501] A. 3 feet.

Q. So you would say it began, it ran for one foot on the shoulder? A. Correct.

Mr. Prendergast: Wait. He said it began 2 feet from the fence. He does not say whether it is north or south. I don't think my brother should lead him. Let us find out what he means by 2 feet from the fence.

The Court: I will permit you to cross examine.

Mr. Prendergast: After the damage is done.

Q. 2 feet was in the field off the fence, or in the shoulder? A. It was in the shoulder south of the fence.

Q. 2 feet from the fence, in the shoulder. And then if the shoulder was 3 feet wide, that would mean the hole began one foot north of the hard packed road? A. That is correct.

Q. One foot north of the hard packed road, westerly bound lane: How far did the hole extend across that westbound lane? A. I would say, about 6 feet.

Q. How wide was that hole? A. The width of the hole?

Q. In an east and west direction. A. In an east and west direction, 10 feet.

Q. How deep was the hole? A. About 6 feet.

[502] Q. Was that true of those four holes you have referred to? A. Correct.

Mr. Mahony: You may inquire.

Cross Examination by Mr. Prendergast

X-Q. When was the first time you eversaw me? A. Thursday, last week.

X-Q. Where? A. In my office.

X-Q. Who was with me? A. The gentleman that is to your right.

X-Q. And did we have some conversation about what information you might have in your office relative to conditions existing on June 21st of 1952? A. Right. You did.

X-Q. Did we ask you to get your records relative to that? A. You did.

X-Q. And did you get out a folder from a file cabinet that was right there by the chair we were sitting on? A. That is correct.

X-Q. There was a young lady in the room that had a desk over there, we will say? A. Right.

X-Q. And we were there before you came in? A. Right.

X-Q. When you came in and took out the folder, you

looked at it, [503] showed us some circulars of the Central—A. Central Line.

X-Q. And that was the organization you told us that was doing this work for you? A. Correct.

X-Q. It was indicated by you to us, that it was a New York concern? A. They are.

X-Q. You indicated to me you had no information that you could give us relative to this transaction other than that it was the Central Line people? A. Central Line.

X-Q. Central Line people that did it, they were from New York, the secretary looked it up, found they had an office in the Park Square Building in Boston? A. That is right.

X-Q. One other thing: you showed us the circular and told us how this thing went between the holes and cleaned out a pipe a distance of 500 feet, that is right, isn't it? A. That is correct.

X-Q. That is correct? Well now, when were you summonsed by this defendant? A. Monday noontime, I believe I received the subpoena.

X-Q. You have brought some folders in here? A. That is right.

[504] X-Q. And do you remember telling me that day over there in your office that there were no holes on the hill between the top of the hill and this Concord line, right here? A. I didn't tell you that.

X-Q. Come over here, then, and point out where you see any digging on any place between the top of the hill and this place on that exhibit, if you can show it, on the highway, down here you get a better view of the road, right down there. Show me on that highway where there is dirt dug out on the westerly section of the northerly lane or that has any dirt 400 feet or 450 feet, as you say, from the dirt at the bottom of the hill? A. I think you will find—

X-Q. Not what you think. Point it out. A. I cannot see it there.

X-Q. You cannot see it. Do you call that a good picture or not?

Mr. Mahony: Wait a minute, objection.

Mr. Prendergast: All right. Step back, will you, Mr. Witness? Incidentally now, I am sorry to have to bother you, while we are talking about it, you can see this picture very plainly from where you are? A. Right.

X-Q. You told this Jury there were signs all over the place? A. That is correct.

X-Q. All you can see in this picture are two signs, aren't there? A. That is right.

[965] You do not see any signs along the side of the road? A. Not in that picture.

X-Q. On the northerly or southerly side? A. I cannot see them, in that picture.

X-Q. This is a picture of the State police, taken on that day, of the accident? A. Yes.

X-Q. Can you see what signs in the picture you say were there the night of June 21st, at 4 o'clock when you left there, June 20th, 4:30, when you say you were there? Do they show all the signs that were there? A. The hole does not show there.

X-Q. All right. Look down to this sign here, do you see it? A. Right.

X-Q. Which is found right in here? A. Right.

X-Q. There is the hole? A. Right.

X-Q. Do you see any signs along that side of the road, or this side of the road? A. I cannot see them, no, sir.

X-Q. Are all the signs in those pictures, on the highway, or about this location, on the night of June 20th, at 4:30, when you were at the scene where this accident later took place; are those all the signs? [966] A. May I go look again?

Mr. Prendergast: Oh, sure. (Witness goes to blackboard.)

X-Q. Here is a better one here for you, there is a better one, with the hole, with the dirt right there, that is right at the digging, yes; these three pictures, put it that way, Plaintiff's Exhibit 9, 7 and 8, show in them all signs that you saw on Route No. 2 at the scene of this location on June 20, 1952, at 4:30? A. Yes, sir.

X-Q. And yet you told this Jury there were signs all over the place, both sides of the street, is that right?

Mr. Mahony: For that distance, where the four holes were.

Mr. Prendergast: Where the four holes were.

The Court: Were these signs put there by the company that was doing the work?

The Witness: Yes, sir.

X-Q. You do not know whether they were there at 7 o'clock on the night of June 20, do you? A. No, sir.

X-Q. You do not know if they were there at 11 o'clock on the night of June 20th? A. No, sir.

X-Q. You do not know if they were there June 21st at 7 o'clock in [507] the morning? A. No, sir.

X-Q. You do not know if they were there at 12 o'clock in the afternoon of June 21st, do you? A. I didn't personally inspect them.

X-Q. You do not know if they were there at 1 o'clock on the night of June 21st? A. That is correct.

X-Q. You do not know if they were there at 1 and 2, at any time on the day of June 21st, do you? A. No, sir.

X-Q. You have a paper here apparently you didn't have when I was out to see you on Thursday? A. That is right.

X-Q. Where did you get it? A. Where did I get it?

X-Q. Yes. A. I took the locations of the holes.

X-Q. I am asking where you got the paper? A. I made the paper up.

X-Q. Where did you get the paper?

Mr. Mahony: The piece—

Mr. Prendergast: Please. He understands the simple question.

X-Q. Where did you get the paper? [508] A. In my office.

Mr. Mahony: May I address the Court?

The Court: That is a simple question.

Mr. Mahony: Does he mean the blank paper, or the paper filled out?

The Court: He can give any answer he wants.

X-Q. Where did you get the paper? A. In my office.

X-Q. When did you get that piece of paper? A. This morning, about 8:30.

X-Q. You were in here yesterday? A. Right.

X-Q. Did you bring that piece of paper in here yesterday? A. No, sir.

X-Q. You have some information written on that paper? A. Yes, correct.

X-Q. Where did you get it? A. From street locations.

X-Q. Street locations? A. Then I went—

X-Q. When did you get it? A. This morning.

X-Q. From whom did you get it? A. I went out and measured it myself.

X-Q. Have you any single piece of paper in your files that will [509] show these ladies and gentlemen here that on the day of the 21st of June, 1952, there was a hole open at a point 400 feet, or would you say 455 feet, east of the Concord-Acton line at previous to 12 o'clock on the day of this accident, and which paper was in existence at that time, of this accident? A. No, sir.

X-Q. Or which paper was put into existence within a month after this accident? A. No, sir.

X-Q. Or which paper was put into existence within a year after this accident? A. No, sir.

X-Q. Or which paper was drawn up within two years after this accident?

The Court: Will you answer that, Mr. Witness?

The Witness: Can I answer it?

The Court: No.

The Witness: No, sir.

X-Q. But for some reason you come in here yesterday, without this information, and overnight you go out, seeking information, is that right? A. Right.

X-Q. Who asked you to go seeking this information? A. No one. I did it on my own volition.

X-Q. How did you know what they wanted? [510] A. Well, I listened to you yesterday, you came out to my office.

X-Q. Yesterday? A. Thursday morning—to know what I could tell you.

X-Q. It was Thursday afternoon. A. That is correct.

Mr. Mahony: Let him finish.

Mr. Prendergast: He is making a mistake; let us correct it.

The Witness: So you wanted what information I could supply. Then, I wasn't able to supply any on the holes in the road, so I told you that I didn't have any, I took some pictures but the pictures did not come out.

X-Q. I wanted you to get the pictures; you said you had taken some pictures? A. Yes.

X-Q. I wanted you to get them? A. Yes.

X-Q. I wanted to get all the information you had? A. Right.

X-Q. I wanted you to come into court, if you have the information, didn't I? A. Right.

X-Q. You can judge from the way I acted, I wasn't asking you to do anything that wasn't 100 per cent right? [511] Mr. Mahony: Objection.

The Witness: I don't feel I am doing anything that is not 100 per cent right.

The Court: The Jury may disregard the last remark entirely. You please answer the question, Mr. Witness.

X-Q. Didn't I ask you in the presence of that gentleman there, if there was a single hole open on that hill, between the top of the hill and the Acton line, and didn't you say there wasn't? A. No, I did not say that.

X-Q. All right. Now, then, let me ask you something, I hope I am not treading on mistrial ground, in view of your testimony, I am going to ask you, do you remember saying there would only be two holes open at one time? A. No, sir.

X-Q. Do you remember saying to the woman when she asked some questions, do you remember saying, "Why didn't he stay over in the right lane, it was available for traffic?"

Mr. Mahony: Wait a minute, objection.

Mr. Prendergast: In view of his testimony, let the Judge decide it. I press the question of the witness.

The Court: I will allow the question.

The Witness: Yes, sir, I did.

X-Q. You said that, didn't you? A. Yes, sir.

X-Q. You would not have made a statement like that if the road [512] was blocked on the right hand side of the road, would you?

Mr. Mahony: Again I object.

X-Q. Would you? A. Can I answer that?

The Court: Certainly.

X-Q. Can't you answer it?

The Court: Do you want to have the question?

The Witness: Say it again.

The Court: Do you want the question read?

(The question is read.)

A. Right.

X-Q. We were talking about the Hobart car, weren't we?

Mr. Mahony: My objection again.

The Court: I will allow it.

Mr. Prendergast: This is only on the question of attacking his credibility, not as probative force.

The Court: I have allowed it.

Mr. Mahony: May I get myself on the record here?

The Court: Certainly.

Mr. Mahony: I understand Mr. Prendergast is now offering it solely on the basis of impeaching credibility and not as to the substantive facts of any such conversation.

Mr. Prendergast: That is right, Mr. Mahony.

Mr. Mahony: It is admitted on that basis.

The Court: I am admitting it on the basis of impeaching [513] the witness' credibility.

Mr. Prendergast: That is all.

The Court: All the corollaries that go with that.

Mr. Mahony: That, I want my rights saved on.

The Court: You have no objection if it is admitted for the purpose of impeaching credibility?

Mr. Mahony: Impeaching credibility. I certainly do not.

The Court: Confine it to that.

Mr. Prendergast: Confine it to that. All right, thank you.

X-Q. Now, Mr. Witness, you say you went out there last night, or since yesterday, to locate some information? A. Yes. I told you—

X-Q. Please. Now, please, you and I will get along all right, don't get excited. I may, but don't you get excited. But I am trying to be a quarterback. Now you went out there and wrote down the information you have here? A. Correct.

X-Q. Well, I suppose that when you went over to the scene of this accident on last night, you went there for the purpose of examining the highway on the northerly lane?

Mr. Prendergast: Is that the northerly lane?

Mr. Daley: Yes.

X-Q. On the northerly lane. On the northerly lane of that highway, [514] assuming the road runs east and west. Right? A. Right.

X-Q. And because you saw certain diggings or evidences of where the road had been dug, you thereupon concluded that there was a hole in that portion of the road at some time; that is right, isn't it? A. In my mind, I knew.

X-Q. You knew? A. I know.

X-Q. Let us take this paper from you for a minute. Show us anything else you have there in your records that will show where there was any digging on that location at any time while this contract was in existence and which records have been in existence since December, 1952? A. Right.

X-Q. Show it. A. Can I—

X-Q. Will you please show me the record? A. There is—

X-Q. There is a picture. When was it taken? A. It was taken the afternoon of the accident, immediately following the accident.

X-Q. After the accident? A. Right.

X-Q. Go ahead. [515] A. My wife found it for me.

X-Q. Go ahead. A. There is the picture.

X-Q. Is the only thing you have, pictures? A. Right.

X-Q. Show me some records where the holes were opened? A. As I told you, I have no records.

X-Q. You have no records? A. No, sir.

X-Q. You have some pictures that were taken after the accident? A. That is correct.

X-Q. Right? A. Right.

X-Q. Now then, did you see some place in the highway yesterday where the road was dug or had been dug out? A. Right.

X-Q. And were they at the location you have noted in this memorandum, whatever it is you have been using? A. That is correct.

X-Q. Don't you know that road has been completely resurfaced between 1952 and yesterday? A. I certainly do.

X-Q. It has been resurfaced? A. It has been resurfaced, correct.

X-Q. You want these people to believe, in spite of the resurfacing, [516] the highway has the evidences on it there, of where the road had been dug out? A. Definitely.

X-Q. Do you mean that it wasn't resurfaced where the road was cut or dug out? A. Yes, sir.

X-Q. You say it wasn't resurfaced? A. It was resurfaced. Do you want me to tell you how it was done?

X-Q. I don't want to get into the contract. I assume they did a good job, you being the man in charge. A. Thank you.

X-Q. Wouldn't you see to it, if you were in charge of a road that was resurfaced, that there would be no evidence of any old ruts or diggings? A. There is a certain amount of settlement.

X-Q. A certain amount of settlement? A. Right. I would be glad to have the Jury see it.

The Court: I don't think you should volunteer, please, the Jury may disregard that entirely.

Mr. Prendergast: Tell me something—.

The Court: You will avoid a lot of provocation, if you don't volunteer. You have testified?

The Witness: No, sir.

The Court: You never testified before?

[517] The Witness: No, sir. Once.

The Court: Every time you volunteer, you get into trouble.

X-Q. When did this job first start? A. I believe it was April.

X-Q. 1952? A. 1952.

X-Q. Where did it start? A. It started, this particular contract, it started in 1952, in April.

X-Q. I am only asking this simple question— A. Okay.

X-Q. When did this job, that the Central Line had, relative to this pipe work, along Route No. 2, when did that begin? A. The contract was let April 23d, 1952.

X-Q. When did the job begin? A. I am sorry, I cannot give you the date.

X-Q. Do you mean you had a contract with an organization to do certain work, and that you cannot tell the Jury here when the work began under that contract? A. I have nothing here.

X-Q. You have nothing here that will show that? A. Right.

X-Q. Well, approximately when did it begin? A. I would say the 1st of May.

X-Q. The 1st of May? A. That would be my recollection.

[518] X-Q. All right, now, it began at the pumping house. A. No, sir.

X-Q. Where did it begin? A. It began at Acton, approximately New York, New Haven and Hartford Railroad track meter chamber, that is easterly.

X-Q. Well, in regard to the location of this accident, where is the place where it began? A. From the Acton line to about 10,000 feet, in a westerly direction, northwest.

X-Q. The Acton line, is this Acton line here? A. Right.

X-Q. So, 10,000 feet back from where this Acton line was, the job began? A. Right.

X-Q. Is it a fact that about every 500 feet, holes were opened up? A. Correct.

X-Q. So that would be, if my arithmetic is not too poor, there were twenty holes open?

Mr. Mahony: 10,000 feet?

Mr. Prendergast: He said it was 10,000 feet.

X-Q. That is so, isn't it, there would be two holes for each 1000 feet?

Mr. Mahony: Up to the Acton line.

X-Q. It began at the Acton line.

[519] Mr. Mahony: No, it began 10,000 feet west over the Acton line.

X-Q. Where did it begin? A. 10,000 feet west of the Acton line.

X-Q. It came to the Acton line? A. Right.

X-Q. The beginning was 10,000 feet from where this accident occurred? A. Right.

X-Q. You said holes were made every 500 feet? A. Approximately.

X-Q. So that there would be approximately two holes for each 1000 feet, right? A. Right.

X-Q. So that for the 10,000 feet, there would be twenty holes? A. Right.

X-Q. Right. How long do you say it took this organization to open and close twenty holes? A. About two months.

X-Q. Two months.

The Court: They have to crawl into the pipe, isn't that right?

Mr. Mahony: No.

The Court: The mechanical device is to clean it out.

The Witness: They put a mechanical device, to clean [520] it out.

The Court: It is under the supervision of trained men?

The Witness: That is right.

X-Q. They have an organization of men that work out of New York, is that right, that do the job, wherever they get contracts? A. Right.

X-Q. In other words, the men go with the job, as it were? A. Right.

X-Q. They are not local contractors that do the job? A. No, sir.

X-Q. Do you say the men have to climb down into the pipes? A. That is correct, for certain procedures.

The Court: They run a little pipe on the side of the road?

The Witness: To serve the customers.

The Court: Sort of temporary service pipe, to take care of customers.

The Witness: Right.

The Court: When doing that, they clean out, they take the big water pipe, put it through a cleaning process, that takes all the scum and fungus growth out of the pipe?

The Witness: They have a lining, so they line. A man goes through to inspect it.

The Court: 500 feet from one end to the other, [521] underneath the ground.

I know you don't mind, Mr. Mahony, I thought I would save time. He goes underneath that, inspects it, approves it before the water connection is made, with that end of the pipe?

The Witness: Right. As a matter of fact, I have been in it myself.

X-Q. The twenty holes were not open at once? A. No.

X-Q. What have you got here? That was in your office, in the records of your office, on Thursday, when I visited you, that shows what holes were open on the day this accident happened? A. Not a thing.

X-Q. Not a single thing. And that is what I asked you when I was over there, among other things, wasn't it? A. Right.

The Court: It won't be a hardship for you to come back this afternoon?

The Witness: No, I would be glad to.

The Court: I was going to say—

Mr. Mahony: I will be through in a minute.

The Court: All right.

Q: You say you have photographs? A. Yes, sir.

The Court: This witness would like to say a word to me. Has anyone any objection?

[522] Mr. Mahony: I have not.

The Court: I do not know.

Mr. Daley: Perhaps you will have one yourself.

The Court: No, I promise you, if won't cause any prejudice. If it is important, I will call counsel up.

Mr. Prendergast: Let us understand, you can talk if you want, but don't bother calling me up. I don't want to get any wrong impressions to the Jurors. I don't think it is fair. It may help me. It may hurt. I do not know.

The Court: You will have a chance to think it over between now—

Q. When were these pictures taken, Exhibit No: 12? A. They were taken immediately following the accident.

Q. Who took them? A. I took them.

Q. Are they a fair representation of what they show, at that time? A. Definitely.

Q. Where was this first one taken from?

Mr. Daley: Perhaps during a recess, we could let you know whether we are agreeable.

Mr. Mahony: I just want to show where they were taken.

Q. That first one was taken where? A. That was taken just west of the traffic circle in West [523] Concord. I have stationed them so that they correspond to the State Highway plan.

Mr. Mahony: The State Highway plan, all right. You say they are a fair representation of what they show. I will offer them.

The Court: You can look those over.

Mr. Prendergast: At recess.

The Court: The witness can come back?

Mr. Prendergast: Recess?

The Court: Yes. I will try to get back.

Mr. Mahony: Quarter past two?

The Court: I will make it 2:15 sharp.

(When the Jury left the court room for the noon recess, the following conference took place at the Bench:)

The Court: What the witness wanted to tell me was this: He said it was done by an outside company from New York. I am familiar with that kind of work they do. I have seen it done in Cambridge. They run a little pipe along the side of the road. You have an awful time getting water, there isn't much pressure.

The only reason he wanted to take the pictures, he didn't want anyone to come along and say later on he should have taken the pictures, is that the reason?

[524] The Witness: I didn't want them to come along and say the job wasn't protected.

The Court: I cannot let that in.

Mr. Mahony: Mr. Prendergast and I both checked on the Central line. They have no record which shows the exact spots.

(End of the Bench conference. Noon recess is then taken.)

[525] AFTERNOON SESSION

The Court: All right.

Mr. Mahony: If Your Honor please, we have a doctor here.

The Court: We will have the doctor come right over.

Mr. Mahony: The X-ray man, Doctor Wyman.

The Court: I regret very much, Doctor, you were delayed, perhaps a few minutes.

(Discussion off the record.)

(Then followed the testimony of Dr. Stanley Wyman.)

JOHN H. ROBINSON, Resumed

Redirect Examination by Mr. Mahony

Q. Are these photographs which you looked at during the recess, No. 6, and numbered from the stations as you go from Concord towards Acton, or going east to west, as you would be traveling in the right hand lane, the most northerly lane, is that correct? A. That is correct.

Q. Now these next five, numbered from 8 to 12, are looking east, and taken from stations west of the Acton-Concord line, is that right? A. Right. There is one in here looking back the other way, of course.

Q. That is on the Concord side of the line? A. Right.

Mr. Mahony: I offer those.

Mr. Daley: I object to them. I would like to see them.

[526] (Counsel and Court examine the photographs.)

The Court: Has he said they are a fair representation of the locus at the time he took them, which was on Saturday afternoon?

The Witness: That is correct, sir.

Mr. Prendergast: Let me see this. I have no objections to any pictures showing the northerly lane or any part of the highway between the crest of the hill and the base, which is 1000 feet.

I object to any, going back any further than 1000 feet. I think that is fair. That is 1/8 of a mile. These pictures go back much further, they go back a mile and a half.

The Court: I will exclude them all except those that go back 1000 feet.

Mr. Daley: I have made no objection to any picture produced in this case relative to this matter. I am sorry to say to the Court, those pictures, taken by an amateur,

are so small in size and bad in photography, it strikes me they are misleading, I object to all of them.

Mr. Mahony: He said they are fair representations, and at the time—

The Court: You insist in offering them?

Mr. Daley: He cannot pull himself up by his boot straps that way, because he said so does not mean you are bound by it.

[527] Mr. Mahony: It does not take a photographer. If he has a photograph, he can say it is a fair representation.

Mr. Daley: I object to it. As you look at them, they don't show anything, they are tiny, misleading photographs of—

Mr. Mahony: Of course they do show something.

The Court: Everyday, run-of-the-mine taker of the pictures.

The Witness: Yes, Your Honor.

The Court: With no conception or suggestion or thought, you had any training, expertness, knowledge, scientific knowledge or study:

Mr. Mahony: The Eastman Kodak Company would be interested.

The Court: I think I will exclude them. They may be marked for identification.

Mr. Mahony: Marked for identification. I will have them marked. Do I understand—

The Court: That is right.

Mr. Mahony: To clarify it, the indication on the back shows the station according to the State Highway plan at which the camera stood or was at the time the picture was taken. The legend at the bottom, for instance, looking to Boston, shows the direction in which the picture was taken, correct?

Mr. Prendergast: Usually if the pictures go in, any [528] writing on the back would be erased.

Mr. Mahony: Counsel, before we came back, asked that this witness take these and mark them in the orde going east to west.

Mr. Prendergast: So we could understand them.

Mr. Mahony: Now that is what he has done.

The Court: I don't think that would make them admissible, because it is done.

Mr. Mahony: I have asked that you identify them so that when I am marking them for identification, it will be clear.

The Court: These are being marked now for identification, for the benefit of the record and in order for Mr. Mahony to protect his rights.

(Photographs marked Defendant Hobart's Exhibit G-1 through G-12 for Identification.)

Mr. Prendergast: Go ahead, I don't care.

Mr. Mahony: So that where it gives the station number on the back, it indicates the point on which the camera is focused.

The Witness: That is right.

Mr. Prendergast: Put them in an envelope.

Mr. Mahony: And the points indicated in those pictures, I understood you to say, were the same on Friday night, June 20th, as on June 21st, 1952, when those pictures were taken?

[529] Mr. Prendergast: Wait, I object to that question.

The Court: What you mean, Mr. Mahony, is they portray conditions as he saw them at half-past four.

Mr. Mahony: The night before.

The Court: As he saw them some time Saturday afternoon.

Mr. Mahony: Right after the accident.

Mr. Prendergast: Please, as I understood the testimony, I can be wrong—

The Court: He said the last time—

Mr. Prendergast: He was talking about signs and nothing else.

Mr. Mahony: These are correct pictures of the signs?

The Court: I will admit them.

Mr. Prendergast: Save my rights to all over 1000 feet. Certainly we should not go beyond 1-8 of a mile.

The Court: I am going to limit them to 1000 feet.

Mr. Mahony: May I be heard?

The Court: Come up.

(Counsel at the Bench and off the record.)

The Court: This question is going to be asked, it isn't going to be asked now, there will be an objection to it. I am not going to rule on its admissibility. That will save us from coming back.

Q. Now so far as the signs are concerned, as shown in these [530] twelve photographs, were they in the same position at 4:30 the Friday night previous, as they were when you took the pictures in the afternoon of June 22, 1952, after the accident, June 21, after you took them? A. Can I answer that question now?

Q. Yes. A. Yes, they are.

Mr. Mahony: That is all. Now they are marked for identification.

The Court: In connection with that conclusion.

Recross Examination by Mr. Prendergast

X-Q. When you came down to the scene of this accident on the night before, namely June the 20th, where did you come from? A. Concord.

X-Q. What part of Concord? A. Concord Center.

X-Q. Where was Concord Center with relation to where this accident occurred? A. Well—

The Court: I tell you what I will do, I will let you take a recess for five minutes, I am going to take some evidence that may or may not be admissible.

The Witness: That would be east of this location.

(The Jury retired at 3:20 p.m. and a Bench conference took place as follows:)

[531] The Court: I want to make sure the Jury is not here. Make sure the Jury is upstairs. All right, Mr. Prendergast, go ahead. This is being taken to be unadmissible only if I rule that the photographs are admissible, and then if I rule they are not, the record will be there, to be used for whatever benefit Mr. Mahony feels it has; or whatever benefit the exclusion of it, the admissibility of it, rather, the exclusion or the admissibility of it may have.

Mr. Prendergast: As I understand it, this is preliminary to examination?

The Court: That is all. I wanted to take it in the absence of the Jury, that is so that no one would be prejudiced.

Mr. Mahony: *Voir dire.*

Mr. Prendergast: I don't want this testimony read to the Jury.

The Court: No, this will be read to the Jury in case I admit it.

Mr. Prendergast: No, I object to that.

The Court: All right. Are you satisfied?

Mr. Mahony: I do not know what the purpose of it is.

Mr. Prendergast: He is trying to find out [532] the picture, then decide whether to go further with it, that is, as I understand it.

The Court: No, I assume the thing that bothered me about it is this, it is Mr. Mahony's contention that regardless of who takes the photographs, the picture, rather, anything that represents is a fair representation of a scene which is correlated with the suit, no matter what it is, if it is a fair representation at

the time or shortly before the accident and afterwards, that is admissible, the weight being for the Jury.

Mr. Prendergast: I will give you decisions which they know, and without any smiles attending my statement.

The Court: It is made as an offer of proof by Mr. Mahony, that these signs are some distance back. They are signs that were there for the specific purpose of warning any person going in a westerly direction that there was street work being done on the highway, so that they would have to travel over that highway with care and probably leave the inner lane.

Mr. Mahony: That is correct.

Mr. Prendergast: That is what he claims. First of all, pictures are discretionary, the admission [533] of them, with the Court. You have never found a decision yet which said you abused your discretion in keeping them out.

You have a picture in front of you, a good picture, 1000 feet. You are allowing a picture of that size to contradict it.

The Court: I haven't said I am going to allow it. They are being marked for identification. I will rule afterwards.

Mr. Mahony: My point is this, may it please the Court, Doctor Hobart was proceeding along in a westerly direction. At some point there was an indication that the right lane, the most northerly lane was blocked and not to be used for traffic.

Mr. Prendergast: Wait.

Mr. Mahony: Just let me finish. The issue here is of Doctor Hobart's negligence or due care.

Now, if that blockage, so to speak, was five miles away, I concede, I submit that for the five miles back,

the evidence it was blocked is all right. If it is 100 feet, the evidence would be blocked by the first point where the signs indicated the road was blocked. A person operating westerly, a person would turn into the middle lane. I submit, a person seeing the signs were there, the [534] pictures are a fair representation of the signs, it should be admitted.

Mr. Prendergast: Mr. Witness, show me any one of these pictures that says that right lane is not to be used for traffic.

Mr. Mahony: "Road closed."

Mr. Prendergast: Pardon me, "Road closed" is to protect the city, that road was open to traffic, wasn't it, Route No. 2?

The Witness: Right.

Mr. Prendergast: You have a sign that says "Road closed", that is right, isn't it?

Mr. Mahony: Yes, sir.

Mr. Prendergast: The traffic was moving up and down on Route No. 2, east and west, that whole day, all during the time this work was going on?

The Witness: That is correct.

Mr. Prendergast: Whether it was in the lane of another, I am not quarreling.

The Witness: That is right.

Mr. Prendergast: You show the Judge any picture you have that says the traffic is not to use the northerly lane, as one goes east to west, and show the picture of the sign saying that, can you?

The Witness: No, sir.

[535] Mr. Prendergast: My brother says you could, I thought.

The Court: I will take it under consideration. It may be marked for identification. I will rule on them. You can get back tomorrow morning?

The Witness: I will have to.

The Court: Why not? Don't you like it as well as Concord?

The Witness: It is different.

The Court: We are happy to have you.

The Witness: I am happy to be in your presence.

The Court: Thank you.

Mr. Mahony: These are to be marked G-1 through G-12 for Identification.

The Court: Come back tomorrow morning.

Mr. Prendergast: I want to be sure, so we will be all right, you have a picture here, I suppose, in this G-1 to G-12 some place, that shows the highway, that shows Route No. 2 in an easterly direction from the construction that was going on, right at the foot of the hill near the Acton line, back in the direction of the top of the hill, have you?

The Witness: I can show you better, not from the Acton line, it would turn from the Acton line, [536] I can show you where it is taken from.

Mr. Prendergast: Let us get that picture so we won't have any trouble. Now so that we will understand each other, and I hope so the Judge understands both of us, these two pictures I hold in my hand now, namely Exhibit G-7 and Exhibit G-6, are the only two pictures you have which were taken by you and which show any of the roadway of Route No. 2 between the top of the hill and Acton?

The Witness: No, there is one more.

Mr. Prendergast: All right. Show it to me, from the top of the hill and Acton, looking in the direction of Acton. This is the top of the hill, looking in the direction of Acton, isn't it?

The Witness: That is correct.

Mr. Prendergast: Those three. We will also say,

this is G-4, these three pictures are the rest of the pictures.

Mr. Mahony: You are not going to put in that G-1?

The Court: G-2, G-1.

Mr. Prendergast: G-4, G-6, G-7. Where is the envelope? Put it in. Thank you.

Mr. Mahony: All right. You will be back tomorrow morning?

[537] The Court: Come back and see us, Mr. Robinson.

The Witness: Thank you very much.

The Court: All right, bring the Jury down.

(End of Bench conference. The Jury assembled in the court room at 3:40 p.m.)

The Court: So that you will have no misapprehension as to why you went out, sometimes in the trial of cases, it becomes necessary to hear some testimony in the absence of the Jury, not with the idea of keeping away from you that which you should hear, but with the idea on the part of the Court, that the Court should exercise some tender solicitude for the rights of the parties and determine whether or not the evidence is admissible or rule upon it.

I had to hear some testimony in your absence. I was hearing it up here. It was uncomfortable for everyone. I thought you should have a recess. Obviously, we have rules of law, we have procedural rules and substantive principles of law. I try to carry them out as I think they should be. So in order to safeguard the rights of the parties, it is my thought I should do that, I want you to feel it was the proper thing to have done, it wasn't made at the request of counsel, I did it of my own initiative.

All right now. Come up.

[538] ROBERT WHITNEY, Sworn

Direct Examination by Mr. Mahony

Q. Mr. Whitney, what is your name? A. Robert Whitney.

Q. Where do you live, Mr. Whitney? A. Ashby, Massachusetts.

Q. And you are married? A. Yes, sir.

Q. And your wife is here in court, too? A. Yes, sir.

Q. Now, are you the Mr. Whitney that was driving that Ford automobile, we have been referring to in this case? A. Yes, sir.

Q. On June the 21st, 1952, was your wife in the car with you? A. Yes, she was.

Q. Who was driving? A. I was driving.

Q. Where had you come from? A. Come from Boston.

Q. Where were you going to? A. Back to Ashby.

Q. Now, will you tell us, as you were approaching the town line of Acton, whether or not you observed any construction work going on, on the right side of the road? A. Yes, sir, there was.

[539] Q. And for what distance easterly of the Acton-Concord line was it going on? A. Oh, as I recall, it would be at least a quarter of a mile.

Q. What was it that called your attention to the fact that there was construction work going on, on that side of the road? A. There were signs on the side of the road, shortly after we left the Concord rotary.

Q. How far was the Concord rotary from the scene of the accident? A. Offhand, about a half a mile.

Q. Now what signs did you see as you were leaving the Concord rotary on the right hand side?

Mr. Prendergast: I have no objection, within 1000 feet. I object to going back any further.

Mr. Mahony: I submit we are not bound by Mr. Prendergast's arbitrary selection of 1000 feet.

The Court: I will allow it.

Mr. Prendergast: Exception.

(The question is read.)

A. There was signs of construction, slow, 2-way traffic, no passing. Besides, I believe there was red flags along the side of the road.

Q. Did you see any horses as you went along the road, wooden horses? A. Yes, sir, in places.

[540] Q. All right now. Do you remember any grade there just before the accident? A. I believe there is a slight grade there.

Q. Let us put it this way: As you were approaching the scene of the accident, take it for 500 feet back, of the point where the accident happened, will you tell us just what you saw take place and what you did? A. We were coming down the grade, we were following another car.

Q. Was that other car the Hobart car? A. Yes, sir. He was approximately three car lengths in front of us.

Q. In what lane was he traveling? A. We were both traveling in the center lane, which was the lane open to traffic. We noticed there was a truck coming up the other way. As we drew closer, we could see he was traveling over the white line into our lane.

Mr. Prendergast: May the words "into our lane" be stricken out?

The Court: They may be.

Q. By that you mean the middle lane? A. Yes, sir.

Mr. Prendergast: The word "we" I think he should testify for himself, "I", not "we".

Q. I suppose that "we" means you and your wife? [541] A. That is right.

Mr. Prendergast: I don't think we should get the impression his wife will testify the way he does.

The Court: Were you the driver of the car?

The Witness: Yes, sir.

The Court: You confine it to yourself. You were the driver.

Q. You were in the middle lane going along and the Hobart car was ahead, in the middle lane? A. Yes, sir.

Q. And you saw this truck going in the other direction? A. Yes, sir.

Q. How far was it in front of the Hobart car, how far was it when he saw it come over the white line?

Mr. Prendergast: I thought he said he was traveling in the white line and not over it.

(The previous answer of the witness was read: "As we drew closer we could see he was traveling over the white line into our lane.")

Q. How far in front of the Hobart car was the truck, when you say you saw him come over the white line and travel in the middle lane?

Mr. Prendergast: That is not the testimony.

Mr. Daley: That is not the testimony.

Mr. Mahony: I submit it is the testimony.

[542] Mr. Daley: According to his answer, he saw it in the center lane, there is nothing to say he saw it crossing into the lane, it was in the lane.

Q. When you first saw the truck, what lane was it in? A. He was traveling over into the center lane.

Q. Traveling over into the center lane? A. Yes, sir.

Q. When you say he was traveling over into the center lane, from what lane was he moving into the center lane?

Mr. Prendergast: I object. He ought to explain what he means by "into the center lane".

The Court: I think I will exclude it, Mr. Mahony. He can describe what he saw. I think he can do it without leading.

Mr. Mahony: Without what?

The Court: Without any leading.

Q. What do you mean by the center lane, Mr. Whitney? A. The lane that was open to westbound traffic.

Mr. Prendergast: May that be stricken out?

The Court: It may be stricken out.

Q. Which of the three lanes was the middle one, the center lane? You said you do not know what he means by center lane?

Mr. Prendergast: I know what he means, you are trying to get him to say something else.

Mr. Mahony: I don't want him to say anything else [543] at all.

Q. When you say you saw the truck, going back over it again—when you first saw the truck, where was it? A. He was traveling with two wheels in the center lane and two wheels in his right lane.

Q. What two wheels were in the center lane? A. His left wheels.

Mr. Prendergast: All right.

Q. What did you see him do after that? A. I see him come on and hit the Chrysler.

Q. Where was the Chrysler when he hit him? A. Just his front wheels, about at the construction holes before the Acton line.

Q. In what part of the road was the Chrysler traveling? A. On the right side of the center lane, right up next to the construction.

Q. And when the truck hit the Chrysler car, what happened to the Chrysler car? A. It knocked it right out of the way.

Q. In what direction did it knock it? A. To the rear and towards the northerly side of the road.

Q. Where did the Chrysler come to rest? A. Up against the State fence.

Q. After you saw that contact between the truck and the

Chrysler car, what became of the truck, what next happened? [544] A. The truck continued on, veering over, coming in contact with our car.

Q. When you say veering over, in what direction do you mean, it was veering over? A. It came over to my right.

Q. What happened then? A. He pushed me over into the State fence.

Q. Where did you car come to rest? A. Up against the fence.

Q. And where did the truck come to rest? A. Up against the fence, aside of me.

Q. What happened to you at that time? A. I received lacerations of both knees and the upper arm, that is about all.

Q. How far in front of the Chrysler car was the truck, when you first saw it in the position in which you say you saw it? A. About three car lengths.

Q. Did you get out of the car yourself, after the accident? A. Yes, sir.

Q. To your car. Did you see Mr. O'Brier around there after the collision? A. I looked over at the truck, I saw him in the cab.

Q. Where was he in the cab? A. He was sitting behind the wheel.

Mr. Mahony: You may inquire.

[545] *Cross Examination by Mr. Prendergast*

X-Q. Now, Mr. Whitney, don't answer any question, unless you thoroughly understand it, will you? A. Yes, sir.

X-Q. You were operating a Ford car going in the direction of Acton on June 21st, 1952? A. Yes, sir.

X-Q. Some time between 1 and 2 o'clock? A. That is right.

X-Q. You were operating, you say, in the middle lane? A. Yes, sir.

X-Q. And a car was in front of you some three car lengths? A. Yes, sir.

X-Q. Ahead. That three lengths ahead of you is as far away from you now as what part of the court room or, if the court room isn't big enough, just tell the Jury that. A. I would say it would be farther away.

The Court: The court room is 50 feet long, wall to wall.

X-Q. The court room is 50 feet long, look the length of the court room.

The Court: From this wall here, Mr. Whitney, look from this wall to that wall. It is 50 feet?

The Witness: It is approximately that.

X-Q. Approximately the length of the court room. Now, on the day [546] you were operating, your wife was sitting one side of you, was she? A. Yes, sir.

X-Q. It was a clear day? A. Yes, sir.

X-Q. No reason why you should be operating your windshield wiper? A. No, sir.

X-Q. The sun wasn't blocking your vision? A. No, sir.

X-Q. You were not wearing sun glasses? A. No, sir.

X-Q. Did you have any glasses on? A. Yes, sir.

X-Q. You did. You have not been wearing glasses here since you have come to court, have you? A. Yes, sir.

X-Q. You have worn glasses around the court room here, have you? A. Yes, sir.

X-Q. You haven't them on now? A. Yes, sir.

X-Q. What are they, lens glasses? A. Yes, sir.

X-Q. I see. Were those the kind you were wearing on the day of this accident? A. They were, sir.

[547] X-Q. Your license requires you to wear glasses? A. Yes, sir.

X-Q. Now then, while you are going along, at some time after you passed the Concord Reformatory, you were right up at the top of this grade that is pictured here on these plans, namely Exhibits 7 and 9? A. Yes, sir.

X-Q. Now there was nothing between the top of this sign here, namely—

Mr. Mahony: Sign?

X-Q. The crest of the grade here and the excavation going on at the base, near the Concord Acton line, which prevented you from operating your car on the extreme north lane, was there? A. I cannot recall for sure.

X-Q. If there was any, will you tell the Jury. Was there? A. There was construction and signs.

X-Q. Doesn't this—the construction and the signs were down near the Acton line, weren't they? A. There were some all along the way.

X-Q. Pardon me. Do you mean there were signs between the top of the grade here and the Concord-Acton line? A. Signs at the top of the grade?

X-Q. I am asking you, between the top of the grade, and then between where the construction was, were there any other signs? A. I cannot say that there was.

[548] X-Q. You cannot say. Well, all right. At any rate, you are operating your car at what speed? A. Approximately 30 miles an hour.

X-Q. About what speed was the car in front of you traveling at? A. I would say, about the same.

X-Q. You were both in the center lane, were you? A. Yes, sir.

X-Q. Now at some time while you were operating in the center lane, do you see a truck coming in the opposite direction? Is that correct? A. Yes, sir.

X-Q. At that time you say that the truck's left wheels were also in the center lane, is that correct? A. Yes, sir.

X-Q. In other words, the first time you saw the truck, its left wheels were in the center lane, is that right? A. Yes, sir.

X-Q. How far in the center lane were the left wheels

of the truck? A. I would say almost straddling it completely.

X-Q. How far now in footage? A. I cannot say.

X-Q. Did you ever say 2 or 3 feet? A. Yes, I might have approximated that.

X-Q. Did you at some other time, under some different circumstances, [549] and while under oath, say this: that the truck's left wheels were in the center lane a distance of 2 to 3 feet? A. I probably approximated that, sir.

X-Q. If that was so, was that the truth at that time? A. Yes, sir.

X-Q. It would likewise be the truth today? A. Yes, sir.

X-Q. Is it fair now, without any qualifications at all, your best first memory is, the left wheels of the truck were on the center lane, 2 to 3 feet? A. Yes, sir.

X-Q. Now you saw the truck in that position when the truck was how far away from you? A. Oh, approximately 75 feet.

X-Q. Did you see the truck when it was in Acton coming towards Concord? A. Yes, sir.

X-Q. Then you must have seen the truck when it was 200-300 feet away from you? A. I wasn't paying much attention.

X-Q. I didn't ask you whether you were paying any attention at all or not. Isn't it a fact now you say the first time you saw the truck, it was 200, 300, 400 feet away from you, over in Acton, coming towards Concord? A. I don't recall that.

[550] X-Q. You told Mr. Mahony, I thought, the first time you saw the truck, it was a certain distance in front of the Hobart car? A. Yes, sir.

X-Q. How far would you say that was? A. Two or three car lengths, approximately.

X-Q. In other words, 50 feet? A. Yes, sir.

X-Q. That would put the truck 100 feet away from you, the first time you saw it, wouldn't it? A. Yes, sir.

X-Q. All right now. At that time your car was following Doctor Hobart's car up the street, in the middle lane? A. Yes, sir.

X-Q. About 50 feet apart? A. Yes, sir.

X-Q. Did the Hobart car always remain in the middle lane until the accident happened? A. I believe so.

X-Q. Don't you know? A. It has been quite a while, I would not swear I remembered.

X-Q. I don't want you to say anything, Mr. Whitney, I want you to give this Jury 100 per cent the facts as you remember them. I am asking one simple question, Did you ever see the Hobarts move out of the center lane up until the accident happened? A. No, sir.

[551] X-Q. Did you ever see the Hobart car do anything other than head in the direction of Acton, from the time you saw the truck up until the accident happened? A. No, sir.

X-Q. Did you ever see the Hobart car turn to the left at any time from the time you first saw the truck, up until the accident happened? A. He might have turned away.

X-Q. Not what he might have done, Mr. Whitney. The question is very simple, did you ever see the Hobart car turn to its left at any time between the time you first saw the truck and up until the accident happened? A. Slightly, maybe.

Mr. Prendergast: I didn't ask you whether it was slight or not. May that go out, Your Honor?

The Court: "Slightly", "maybe", yes, it may.

X-Q. You have no interest in this case, have you? A. No, sir.

X-Q. You are not prejudiced against the truck driver, are you? A. No, sir.

X-Q. Let me ask again, at any time from the time you

first saw that truck up and until this accident happened, did you ever see Doctor Hobart's car turn to the left? A. Yes, sir.

X-Q. You told the police that, didn't you? [552] A. Yes, sir.

X-Q. And when he turned to the left, the accident happened, didn't it? A. As he was turning, sir.

X-Q. As he was turning, the accident happened, didn't it? A. Yes, sir.

X-Q. And you were within 50 feet of this accident when you saw that happening. That is so, isn't it? A. Yes, sir.

X-Q. Now I don't mean to be sarcastic, having the grand stand seat that you did, will you tell us whether you ever saw the right side of your own car strike the left side of Doctor Hobart's car? A. No, sir.

X-Q. Now, I presume, Mr. Whitney, that this thing happened quickly? A. Yes, sir.

X-Q. Sure. And you being only 50 feet now behind an accident that is happening up at the head of the room and when you were traveling at about 30 miles per hour, let us reduce it to 25 miles an hour, you realize, don't you, you are traveling 37 feet in 1 second? A. Yes, sir.

X-Q. You realize that, don't you? This accident happened in approximately even less than 1 second, didn't it? [553] A. Yes, sir.

X-Q. At the time between the happening of the accident and your getting struck, you had apparently done all you could to apply your brakes and protect yourself? A. Yes, sir.

X-Q. And you saw that the truck was going towards the fence, didn't you? On your right, I mean, coming across the road? A. It seemed to me he was coming towards me, sir.

X-Q. Towards you. All right. When you saw that thing happening like that, right in front of you, you were not

able to stop your car before you were in the accident, were you? A. I cannot say for sure.

X-Q. You reduced the speed somewhat? A. I must have been pretty close to being stopped.

X-Q. I will not quarrel with you about that. At any rate, you tried to stop your car? A. Yes.

X-Q. The first thing you know, the right side of the truck and the left front of your car are together and you are being pushed over that way? A. Yes, sir.

X-Q. That is the way it happened, isn't it? A. Yes.

X-Q. When you got out, the cars were in the position that they are shown in up here on this exhibit, Plaintiff's Exhibit 4? [554] A. Yes, sir.

X-Q. This being your car and this being the truck, that is right, isn't it? A. Yes, sir.

X-Q. Your front left wheel was flat, wasn't it? A. Yes, sir.

X-Q. There was a dent on the top of your car here? A. Yes, sir.

X-Q. Was that due to this accident? A. It was.

X-Q. I mean, again, don't be misled, I am not accusing you of having been in any other accidents and you got that, there was also a dent along here. Did that dent in the roof of your car come from this accident? A. I believe it was from the frame.

X-Q. I don't care where it came from, it came from this accident. This piece of aluminum, whatever it was, was off your door? A. I cannot say for sure, I thought it was off my door.

X-Q. You can see as far as here now? A. Yes, sir.

X-Q. Can you see whether that is off or not? A. Yes. I remember it was off.

X-Q. The front bumper of your car, the front left corner of your bumper was pulled forward and ahead from your car, wasn't it?

Mr. Prendergast: This is the last question I hope I [555] have to ask you. 4 o'clock is here, Judge.

The Court: Don't you think we better recess now and come back in the morning?

Mr. Prendergast: Yes.

(Adjourned at 4 p.m. to Thursday, December 8, 1955, at 10 a.m.)

[556]

SEVENTH DAY

Court Room No. 5, Federal Building,
Boston, Mass.,
Thursday, December 8, 1955, 10 a.m.

[The session began at 10:15 a.m. in the absence of the jury.]

The Court: I have decided, Mr. Mahony, that I will exclude the pictures and save your rights.

Mr. Mahony: The photographs marked Exhibits 1-12 for Identification are excluded, and I understand the defendants and the plaintiff Hobart's rights are saved.

The Court: I might point out I am excluding these small photographs, among other things, for the fact, Mr. Mahony, that they are not necessary in connection with the subject matter of the inquiry here. It is apparent that your client was traveling not on the outside line where they were digging but in the other lane, or the center lane, and the pictures here show the locus, and it is within my discretion to exclude them because they are not relevant.

Mr. Mahony: The evidence has been so far from Dr. Hobart, and there will be further evidence, that he was traveling in the extreme right lane until he came to these signs.

The Court: I think that is perfectly all right. [557] I think he has a right—

Mr. Mahony: Until he came to the signs or indications

that the third or right lane was no longer fit for use and then he turned into the middle lane.

The Court: You see, Mr. Robinson is not attached to the Highway Department of the City of Concord at all, and the Public Works Department of the Commonwealth whose representative testified, and then the official photographer was out there on the scene and took pictures of the locus which was fairly inclusive of all the points of interest. Now, then, in addition to that, these signs were signs that Mr. Robinson said were put up there not by the Water Department but by the concern that was doing this work; and, where they were put up, how they were put up, it is apparent that signs were there — they are shown in the photographs—signs were there for some distance from the scene of the accident.

Mr. Mahony: Well,—

The Court: I wouldn't want, I don't want to foreclose you, Mr. Mahony, on anything you feel you have a right to get in here; but I am excluding them because I think they will only confound the jury here. The witness testified he saw these signs and because of that he was put on his guard, he was watching it.

Mr. Mahony: My point is this:—

The Court: And you have a right to argue that to [558] jury, and Mr. Prendergast I assume has the right to argue the other way. And I can assure you I am not going to charge on a single fact here, I am not going to comment on a single fact in this case. I have no intention of doing it because I think the situation has been handled in a very wonderful way between your fine lawyers. I think it would be manifestly unfair on the part of this Court to express his personal opinion, and, apart from that, I really haven't any. I can truthfully say that. I see nothing in the trial of this case which would justify the expression of opinion. I have seen it in cases where I have been obliged to do it

but I don't see it here; and then, if I did, I would do it only in an advisory way. I haven't the slightest intention of letting that happen, and I haven't the slightest intention—I am going to suggest to counsel that when you argue counsel should be allowed to argue and finish the argument. Of course I recognize the right of counsel to stand up and object. Whatever it is, are you satisfied to do that? Whatever it is can be cured because I think you fine lawyers, it is quite clear, one is not trying to take advantage of the other, and it is a real pleasure for me to sit here and preside over a real trial like this.

Mr. Mahony: There are two points that I am interested in, may it please the Court. One stems from what the Court has just said—that if there is objection to the [559] argument of counsel, the objection need not be taken at the time of the allegedly improper argument, but may be taken at the end.

The Court: If you feel you should do it from time to time—

Mr. Mahony: I think it is our obligation to exercise it.

The Court: That's right.

Mr. Mahony: Let's follow the rules.

Mr. Prendergast: O. K.

The Court: I want to speak of this. I am definitely doing this because I have given it a lot of thought. I am excluding them because in the light of all the attendant facts and circumstances they are not admissible, Mr. Mahony. I am not assigning any reason.

Mr. Mahony: My purpose in offering them, may it please the Court, was, as Dr. Hobart was traveling west and confronted with this situation, that is an important issue in the case. There are none of these photographs that show that condition, and the photographs which are offered are the only photographs showing those signs that confronted Dr. Hobart.

The Court: Well, I think Mr. Robinson has a right to testify and I wouldn't exclude it.

Mr. Mahony: He has testified to that.

[560] The Court: And use some of the photographs to refresh his recollection that there were signs.

Mr. Mahony: He has already testified to it but the photographs were confirmatory of it. That is the reason I was offering them. But if my rights are saved, that is all I care about it.

The Court: That doesn't involve all the photographs, does it?

Mr. Mahony: These twelve.

The Court: The twelve show that?

Mr. Prendergast: Yes, yes.

The Court: Let me see them again. [Handed photographs.]

The Court: Mr. Mahony, would you be good enough to ask Mr. Robinson to come back to the witness stand. Would you have any objection if I asked him some questions?

Mr. Mahony: Certainly not.

JOHN H. ROBINSON, recalled.

The Court: I call your attention, Mr. Robinson, to this picture here which you say you took, and it says, "CAUTION PIPE CONSTRUCTION OPEN TRENCHES PASS AT YOUR OWN RISK." Will you tell me how far that is from the scene of the accident?

The Witness: Yes, sir. That is 2242 feet, two thousand two hundred and forty-two feet.

[561] The Court: Have you any question you would want to ask Mr. Robinson—

Mr. Mahony: Certainly.

The Court: —so in case I should change my ruling you wouldn't need him? Is that so?

Mr. Prendergast: No.

The Court: Do you want to ask him questions?

Mr. Daley: Not if you are ruling at the bench.

The Court: I mean assuming that I don't. As a matter of fact, I have looked at this one, and there is a picture there I understand Mr. Mahony offers this for the purpose of showing that some distance down the road— That's coming from Boston, is it?

The Witness: Correct, sir.

The Court: That is coming from Boston.

Mr. Mahony: That is what confronted Dr. Hobart as he was traveling west.

The Court: There is no testimony that he said that, is there?

Mr. Daley: There is no testimony it was there when Dr. Hobart came along from this witness. He said he was there at 4:30, then he went back and took the picture when he was out there trying to protect himself from any possible claim after the accident was all over.

The Court: Is there any question you care to ask [562] him, Mr. Prendergast?

Mr. Prendergast: Yes.

Cross-Examination by Mr. Prendergast

X-Q. Isn't the reason you took these pictures was because you were afraid the Town of Concord might be sued? A. The reason I took the pictures was to show that proper signs were set up.

X-Q. Now, Mr. Robinson, did you ever make the statement the reason you took them was because you were afraid the Town of Concord might be sued? That's a simple question. Answer it, Yes or No. A. No, sir.

X-Q. What made you hesitate so long when I asked you a perfectly simple question? A. I wanted to be sure I was giving the right answer.

X-Q. It took you so long to answer my question just because you wanted to be sure that you were giving the right answer? A. Right.

X-Q. Well, Mr. Witness, directly or indirectly, was the reason why you took these pictures because of the fact you were afraid the Town of Concord might be sued and your job might be in jeopardy?

The Court: Well, I wouldn't say his job was in jeopardy. You were doing it out of a sense of duty to your town?

[563] The Witness: Right. That is correct.

The Court: There is nothing wrong about that. In other words, when you took these photographs you were doing it for the purpose of protecting the best interests of the town?

The Witness: That is correct.

The Court: You being the Commissioner of — Water Commissioner?

The Witness: That is correct.

The Court: And the work being let out to an independent contractor and the possibility the Town might be involved in litigation you wanted to have the photographs.

The Witness: That was the underlying principle, yes, sir.

The Court: That's right. There's nothing wrong about that. That was a very commendable thing to do, was it?

Mr. Prendergast: Oh, sure.

The Court: Now, is there any other question?

Mr. Prendergast: I'm through as far as I am concerned.

The Court: I am going to give it some further thought, but I thought of it during the night.

Now you can bring the jury down. Any more doctors testifying, Mr. Mahony?

Mr. Mahony: No more doctors. The hospital record. Oh, I understand Mr. Buzzell has one.

[564] Mr. Buzzell: There is a physician.

The Court: That's all right, Mr. Buzzell. You can have anything you want.

[Jury entered court room at 10:35 a.m.]

The Court: [To jury] We were discussing some questions of law, with the court reporter here, and I thought it was best to have you upstairs while we were doing it in order there would be no prejudice of any kind toward either side.

[565] ROBERT L. WHITNEY, resumed.

Cross-Examination by Mr. Preidergast

X-Q. Now, Mr. Whitney, again I am going to ask you to be kind enough not to answer any questions until you know what I am asking and you understand the question. You will, won't you? A. Yes.

X-Q. I think, yesterday, when we finished I was looking for a picture and I had already asked you if it wasn't a fact that the front left corner of your vehicle was pulled forward and away from the car, as is shown in Exhibit 5? A. Yes, sir.

X-Q. That's right, isn't it? A. Yes, sir.

X-Q. Now I think you said yesterday in direct examination that when the accident happened the Hobart car—and I may not be quoting you correctly but as near as I can I will—bounced or was pushed backward until the back went over against the fence which was on your right-hand side? A. Yes, sir.

X-Q. Is that right? A. Yes, sir.

X-Q. All right. Now let me ask you this. You heard Dr. Hobart testify that when he came down from the top of the grade he was on the right-hand lane, didn't you? A. I believe so.

[566] X-Q. Well, you say that he was in the middle lane; don't you? A. Yes, sir.

X-Q. Well, now, having in mind what the doctor said in his testimony here, namely, that he was in the right-hand lane, do you want to change your testimony that the doctor's car was in the middle lane when he came down the grade? A. No, sir.

X-Q. You still say he was in the middle lane? A. Yes, sir.

X-Q. Well, now, then, as you were coming along down the grade, I think you said about 50 feet behind the doctor's car, at any time before the accident happened did you intend to bring your car to a stop? A. Yes, sir.

X-Q. When did you intend to bring it to a stop? A. When I sensed there was going to be an accident in front of me.

X-Q. Well, let me put it this way. At any time as you came down that grade did you ever before the accident happened intend to bring your car to a stop?

Mr. Mahony: You mean before the collision?

Mr. Prendergast: That's right.

X-Q. Before the accident occurred.

Mr. Mahony: You mean the collision between the truck and the Hobart car?

[567] Mr. Prendergast: To be more specific, I'll put it again.

X-Q. Don't let our colloquy up here upset you. You're driving your car down the street. In front of you there by the wall, or about that distance [pointing], was the back of Dr. Hobart's car. Is that right? A. Yes.

X-Q. And as you were proceeding along you at some time saw the truck? A. Yes, sir.

X-Q. Now, at any time between the time you saw the truck and the time that Dr. Hobart's car and the truck came into collision did you intend to bring your car to a stop? A. No, sir.

X-Q. No. Now, you don't want to change that answer in any way, shape or manner, do you? A. No, sir.

X-Q. You don't want to add anything to it, do you? A. No, sir.

X-Q. You don't want to take anything away from it, do you? A. No, sir.

X-Q. The reason that you didn't intend to bring it to a stop from the time you saw the truck and up to the time the truck and the car came together was because the truck and the car ahead of you were in a position that you felt if they both [568] went straight ahead there was no reason why you should have to stop; that is right, isn't it? A. No, sir.

X-Q. It could be no other reason, could it?

Mr. Mahony: Objection.

X-Q. It could be no other reason, could it?

Mr. Mahony: Objection.

The Court: This is cross-examination.

Mr. Mahony: I know, but the witness said he did it, that's his state of mind. Now my brother is arguing there couldn't be any other reason.

The Court: In the answer he said that was not the reason.

Mr. Mahony: Was not the reason, and that is his state of mind. Now, how can my brother—

The Court: Now, I think on cross-examination the witness can tell, has a right to explain his reason, if he has any other reason.

Mr. Mahony: That's it exactly. He said it was not the reason and he is not asked the reason.

The Court: Yes, he said he is asked the reason.

Mr. Mahony: No, I beg your Honor's pardon.

Mr. Prendergast: Well, let's go back. I don't want to fool around with this. Let's go back.

X-Q. You told this jury, you have given an answer to

this jury, [569] that from the time you first saw our truck up to the time the accident happened you did not intend to bring your car to a stop, and you say you don't want to qualify that answer in any way, shape or manner; that is so, is it? A. Yes, sir.

X-Q. Well, certainly, if that truck of ours was in a position where it was going to block your progress you would have intended to have brought your car to a stop, wouldn't you? A. Yes, sir.

X-Q. Yes. Now, Mr. Witness, there was a dotted line, or a white line, or white painted line, dividing the extreme north lane and the middle lane that you were operating in on the day in question? A. Yes, sir.

X-Q. As you come along down the grade. The top of the grade, according to the plan which is on the reverse side here from the Concord line was a distance of 7 plus 20, which would be a distance of 720 feet. Will you accept that figure as being correct? A. Yes, sir.

X-Q. Now, for that distance of 750 feet—

Mr. Dailey: Twenty.

X-Q. 720 feet from the top of the grade down to the excavation, down at this line, there was nothing in the right-hand lane to block your occupying it for some of the distance, was there? [570] A. For some of the distance, sir.

X-Q. All right. While proceeding—

Mr. Prendergast: I withdraw that.

X-Q. For how long was that distance? A. I can't say for sure, sir.

X-Q. Well, was it, in your judgment four or five hundred feet? A. I can't say.

X-Q. You can't say. All right, then. Well, at any rate, you say that when you came to that place where the road on the right, the lane on the right was open to travel, Dr. Hobart didn't pull over into it, did he?

Mr. Mahony: Wait a moment. Objection.

Mr. Prendergast: I will put it this way.

X-Q. Did Dr. Hobart pull over into that part of the road?

Mr. Mahony: Objection.

The Court: I will allow it.

Mr. Mahony: Your Honor has in mind he has included in that question "open for travel" in spite of these signs?

Mr. Prendergast: And why not?

The Court: That's right.

Mr. Prendergast: There is no claim he couldn't occupy that right lane.

X-Q. Dr. Hobart didn't pull over into that part of the right lane that was free for travel, did he? A. No, sir.

[571] X-Q. And you didn't, did you? A. No, sir.

X-Q. Now, then, did you keep close to this line that was dividing the northerly lane and the middle lane as you came along? A. Yes.

X-Q. Did you? A. Yes, sir.

X-Q. Well, now, will you be kind enough to tell the jury where the right side of your car was in relation to that line? A. I would say right next to the line, sir.

X-Q. All right. In other words, you mean a matter of inches? A. Yes, sir.

X-Q. Maybe the wheels were on it? A. Yes, sir.

X-Q. Will you be kind enough to tell the jury in relation to that line where the right side of the doctor's car was? A. About the same place.

X-Q. About on the line. Now, then, Mr. Witness, the width of the lane was 6 feet—I mean, 10 feet; that's right, isn't it? A. I believe I heard that.

X-Q. The width of your car isn't over 5½ feet, is it? A. I couldn't say that for sure.

X-Q. What? A. I wouldn't want to say that for sure.

X-Q. Well, don't misunderstand me. I don't want you

to feel [572] I expect you to be 100 per cent accurate on the question of the width, but wouldn't you say the width of, we'll say, your car, or the doctor's car, was approximately 5½ feet? A. Yes, sir.

X-Q. All right. So we then have it the wheels of your car and the doctor's car—assuming this [pointing] is the line between the right lane and the middle lane—were either on the line or within a matter of a couple of inches of the line? A. Yes, sir.

X-Q. So that the left side of the car is out at the most only 5½ feet, isn't it? A. Yes, sir.

X-Q. Now, if you can't see this line here from where you are—can you? A. Yes, sir.

X-Q. Can you really see it? A. Yes, sir.

X-Q. All right. Can you see the picture of what is on the right-hand lane under my right hand? A. Yes, sir.

Mr. Prendergast: I'm so close I can't even see it.

Mr. Mahony: Do you want my glasses?

The Court: Take mine.

Mr. Prendergast: No.

X-Q. You see the—

[573] The Court: Would you like to step down and see it, Mr. Witness?

The Witness: I think it would be better.

The Court: Would you like to have him step down?

Mr. Prendergast: Well, whatever is best for him. I want him to see it.

The Court: Would you like to go down?

The Witness: Yes, sir.

The Court: All right, go ahead.

[Witness leaves stand and advances toward Mr. Prendergast.]

X-Q. That [pointing] is the white line there, isn't it; that part in the corner of the picture under my left hand is on the white line? A. Yes.

X-Q. Now, walk down here. That's the white line there, isn't it [pointing]? You see it there? A. Yes.

X-Q. All right. So there's the picture I have got there. The only dirt on Route 2, on the middle lane of that highway is what is shown now to the right in the figure on Exhibit 7; that is right, isn't it? This little bit of white stuff that you see right there, that my finger is on? A. Yes.

X-Q. That's right, isn't it? A. Yes.

[574] X-Q. Now please go back to the stand.

[Witness returns to witness stand.]

Mr. Prendergast: Thank you, Mr. Whitney. That is all.

Redirect Examination by Mr. Mahony.

Q. Mr. Whitney, at the moment of contact between the Hobart car and the truck, in what lane was the Hobart car? A. In the center lane.

Q. All of it in the center lane? A. Yes.

Q. And at that time in what lane was your car? A. In the center lane.

Q. All of it in the center lane? A. Yes, sir.

Mr. Mahony: That is all, Mr. Whitney.

Mr. Prendergast: That is all, thank you.

Mr. Mahony: That is all.

[575] LILLIAN WHITNEY, sworn.

Direct Examination by Mr. Mahony

Q. What is your name? A. Lillian Whitney.

Q. Where do you live? A. Ashby.

Q. Keep your voice up, if you will, so everybody can hear down here. Are you the wife of the last witness, Robert Whitney? A. I am.

Q. Mrs. Whitney, on June 21, 1952, were you in the car which he was driving? A. I was.

Q. And as you were driving along, say, from the time

you left—do you know where the circle is at Concord? A. I do.

Q. As you left the circle at Concord in what part of the road was Mr. Whitney driving?

Mr. Prendergast: I pray your Honor's judgment. Now we're going back about 3,000 feet, on the previous witness's testimony. I think we should hold this case to within a thousand feet of the scene of this accident. That's where the negligence, if any, arose and continued. We ought not open up the field way back there.

Mr. Mahony: I want to open up the field to show [576] where they came into the construction and from there on.

The Court: Doesn't the picture here show the place?

Mr. Mahony: No, it does not.

The Court: The place of the first construction?

Mr. Prendergast: From the top of the hill down, as I remember.

The Court: Is there any evidence what construction before this was?

Mr. Mahony: Yes, there are four holes.

The Court: Going in the other direction?

Mr. Mahony: No, east.

Mr. Prendergast: Oh, no, no, no, no, Mr. Mahony.

Mr. Mahony: Mr. Robinson testified to holes, at least three.

Mr. Prendergast: And he put some of them in Acton; so let's stick to this place here.

The Court: Would you mind repeating it? I don't know what the testimony is.

Mr. Mahony: All right. Wherever the Hobart car and the Whitney car were traveling on the extreme right and came to indications that construction was ahead, whether that was an eighth of a mile or three miles east I submit I am entitled to.

Mr. Prendergast: I submit he is not—any more than

if there were children back half a mile, he would have a [577] right to show he went by those children.

The Court: Isn't it possible, in the light of the fact the Commissioner, the Water Commissioner of Concord is here and knows exactly where these were, to clear that up, Mr. Mahony?

Mr. Mahony: I thought he had cleared it up. He put the one nearest to Boston.

The Court: I thought he said the one nearest to Boston.

Mr. Mahony: Will you step back, Mr. Robinson.

The Court: The one here is the one nearest to Boston, he said.

Mr. Daley: That's right.

The Court: That's what I thought he said.

JOHN H. ROBINSON, recalled.

Direct Examination by Mr. Mahony

Q. Having in mind, Mr. Robinson, the hole which is referred to in the picture near the Acton line, but on the Concord side of it, was there any hole or holes east of that at the time? A. Yes, sir.

Q. And what was the next hole east of this one, this particular one? A. Approximately 500 feet.

Q. Was there any hole east of that second one? A. Yes, sir.

[578] Q. How far east of that was it? A. That was 970 feet from the line; would be about 950 feet.

Q. Was there any hole east of that third one? A. Off of the road entirely.

Q. To the right, you mean? A. Off the road entirely.

Q. So that from the Acton line up to the point you say now was off the road entirely how many holes were there? A. From the Acton line? Wait a minute now, let me think.

Q. There was one near the Acton line. A. Three holes.

Q. East of the Acton line? A. Three holes—four holes east of the Acton line; three holes east of the Acton line on the hard surface.

Mr. Prendergast: Wait a minute now. Let me have that answer read, your Honor.

The Court: Oh, certainly.

[Last answer read.]

Mr. Prendergast: Well, I don't suppose the fourth hole is of any consequence if it isn't on the highway. I submit that should be stricken out, if it's off the highway some place.

The Court: I thought you were going to find out whether or not this was the hole nearest Boston? They were coming from Boston; isn't that right?

[579] Mr. Mahony: Yes, the Hobarts were coming from Boston.

The Court: Which is the hole nearest to Boston?

Mr. Mahony: He has just stated that there was a hole 900 and some odd feet—

Q. From the town line? A. Right.

Q. Then you say there was another hole—where? A. Approximately 500 feet from the town line, and another hole 33 feet from the town line.

Q. The hole most east of the town was where? A. That's the one that is off the hard surface.

Q. In the road first, where was the one furthest east from the town line? A. 270 feet.

Q. Now, you said there was some other hole that was not in the hard part of the road? A. That is correct.

Q. Where was that hole?

Mr. Prendergast: I pray your Honor's judgment now. I submit we are not a bit interested in where it was. If it wasn't on the highway and involved in connection with the accident, I submit it has nothing to do with the case.

The Court: Well, if it wasn't on the highway and they

were not using any part of the highway, why would it become important?

[580] Mr. Mahony: That hasn't yet appeared. I don't know.

Mr. Prendergast: He said it was off the highway.

Mr. Mahony: If the hole was off the highway but the dirt was piled on the highway, I submit it may be material.

The Court: That's right, it was.

Mr. Prendergast: Well, ask him the question if the dirt was on the highway.

Q. Where was the hole that you referred to, this last one? A. Off of the highway.

Q. How far off the highway? A. About 3 feet.

Q. Was any of the highway occupied by anything that related to that hole? A. No, sir.

Q. So that the most easterly hole in this area was 970 feet? A. 970 feet.

Mr. Mahony: That is all.

The Court: Well, would you mind, Mr. Mahony—All I want to do is to get this straight. Mr. Robinson, you know where the scene of the accident was?

The Witness: Yes, sir.

The Court: Is that the hole nearest Boston?

The Witness: No, sir.

The Court: Oh, all right. Was there one nearer than that?

[581] The Witness: Yes, sir. Two more.

The Court: This side of that one?

The Witness: That's correct. On the Boston side.

The Court: On the Boston side. In the light of that, I will permit the inquiry, Mr. Mahony.

Mr. Mahony: All right.

Mr. Prendergast: Wait. I want a cross-examination.

The Court: All right.

Mr. Prendergast: You don't mind, do you?

The Court: Oh, no. I want all of you to cross-examine to your heart's content. I am very anxious to have preserved the rights of all. There's no one that's been guilty of any transgression that I know of.

Cross-Examination by Mr. Prendergast

X-Q. Mr. Witness, it has been testified to here,—and I think maybe you are one of the witnesses who testified to it,—that the space between these posts, cements posts, is about 10 feet. A. I didn't testify to that, sir.

X-Q. Would you agree it is about 10 feet? A. I would agree.

X-Q. All right. Now, then, let's do some counting. There [pointing] is the dirt, the nearest edge of the dirt to that post? A. Right.

X-Q. [Counting] 1, 2, 3, 4, 5, 6, 7, 8, 9. No, I'll go [582] back again. There's some post that is opposite that sign. This one here [pointing], isn't it? I think it will be easier if you draw the line right across there. Now, 1, 2, 3, 4, 5, 6, 7, 8,—beginning at that one there; 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20. There are 20 up to that post; right—that I have counted? A. Yes.

X-Q. That means that if there is 10 feet, there is 200 feet up to this post; right? A. Right.

X-Q. There are three posts from here, which we say—but we may be wrong and the jury will say, and Mr. Mahony will say, whether there are or not—from here and there were 9 or 10 from here, making 460 odd feet. Right? A. Right.

X-Q. I think you said there was a hole dug east of the one shown in Exhibit 8, about 450 feet; right? A. Correct.

X-Q. Now, come over here and show the jury where the hole was.

The Court: Will you indicate on the record what you are referring to?

Mr. Prendergast: On Exhibit 9.

X-Q. Come over here and show the jury anything further on that highway from that hole, or what you say is further from the hole. [583] A. I would say that right there represents—

X-Q. Wait a minute. Stand back so the jury can see. A. —there is a barricade,—

X-Q. Just a minute.

Mr. Prendergast: I ask that be struck out.

The Court: It may be.

X-Q. I am asking you a very simple question about the dirt, not barricades.

The Court: I will let you examine on redirect, Mr. Mahony.

X-Q. You show me any dirt on that highway, on the lane—dirt, not trees or barricades. Show the dirt. A. The cars obscured it, sir.

X-Q. I didn't ask that.

Mr. Prendergast: May it be stricken out, your Honor?

The Court: It may.

X-Q. Show the dirt, if there is any and you see it. A. I can't— [Balance not heard.]

X-Q. Do you want to argue the case? A. No, sir.

X-Q. Are you interested in the outcome of this case? A. No, sir.

X-Q. Tell us, then. Do you see any dirt on that highway? A. No, sir. I cannot see it in the picture.

[584] X-Q. That's all I'm asking.

[Mr. Prendergast removes large picture from lower right-hand side of easel.]

X-Q. Now, step over near the jury, if you will, please.

Mr. Prendergast: Mr. Nitken, will you please step up here.

[Discussion off the record.]

X-Q. Now, Mr. Witness, you pointed out, or I thought you started to point out a barricade. Is that right? A. Yes.

X-Q. Now will you tell me something. Do you see that car there, up straddling that line [pointing]? A. No, sir.

X-Q. You don't see that car? That's all I am asking you. A. Yes, sir. Your thumb was in the way.

X-Q. You see the car behind it? A. Yes.

X-Q. You see there is a man standing on the running-board of that second car? A. Yes, sir.

X-Q. Now do you see another car right directly opposite that barricade and away beyond on the right-hand side?

Mr. Mahony: Opposite what barricade?

Mr. Prendergast: Right there [pointing]. There's one right behind this fellow.

X-Q. Do you see it? [585] A. Yes, sir.

X-Q. Do you see how close to the right-hand side of the lane that car is? A. I do.

X-Q. Do you say there is a hole dug right there? A. I couldn't tell you definitely, sir.

X-Q. That's all. Now, Mr. Witness, do you say on the day of this accident that hole was open? A. Yes, sir.

X-Q. You haven't a single record, though, showing it, have you? A. On the picture.

X-Q. Here [pointing], right here—you haven't a single record of the Town of Concord showing it, have you? A. Just my pictures.

X-Q. I didn't ask you that.

Mr. Mahony: That's a record.

Mr. Prendergast: Well, his pictures aren't a record of the Town of Concord.

Mr. Daley: It isn't a record of anything.

X-Q. Those are the pictures the Judge wouldn't let in evidence. A. That's correct.

X-Q. That's correct, isn't it? A. Yes, sir.

X-Q. All right. Now tell me just one other thing while

you are here. Did you have any sign on that highway saying [586] 2-way traffic? A. No, sir.

X-Q. Did you hear Mr. Whitney say he saw a sign on that highway saying 2-way traffic yesterday afternoon? A. Are you asking me?

X-Q. Were you here yesterday afternoon? A. No, sir. I was not.

X-Q. How you gone? A. I must have. I didn't see him on the stand.

Mr. Prendergast: Oh, well, you had gone, apparently. That is all.

Mr. Mahony: That is all, Mr. Robinson. Now, Mrs. Whitney.

The Court: Will counsel come up?

[Conference at the bench, during which the following is recorded:—

The Court: For the record, I have ruled summarily and permitted the last witness, Mr. Robinson, to say that this photograph that shows the excavation there in the highway, this side, that is, on the Boston side of where the accident took place—I would like to have counsel—I want it part of the record; I want the record to show where the hole was.

Mr. Mahony: This record [pointing], is the first hole, which is 980 feet. Now, this particular [587] hole inquired of by Mr. Prendergast is 470, and he says he has a picture showing that hole, and that is the hole [handing].

Mr. Prendergast: I'm not interested in that photograph.

Mr. Mahony: That is showing the hole.

The Court: I am disposed to permit those to go to the jury. I think they have become competent.

Mr. Prendergast: Which is this one [pointing]?

Mr. Mahony: That is the one you have been discussing.

Mr. Prendergast: The one on the Boston side of where the accident occurred?

Mr. Mahony: Yes.

Mr. Prendergast: Which is the one that is entirely on the other side of the hill? I object to that.

Mr. Mahony: That is 980 feet. That is still within the thousand feet.

Mr. Prendergast: Isn't that on the other side of the hill?

Mr. Mahony: No, it isn't.

Mr. Prendergast: Well, look and see. I don't care what your impression is.

Mr. Mahony: You have been arguing about a [588] thousand feet, and this is only 980 feet.

The Court: I will admit those two pictures.

Mr. Prendergast: Save our rights, your Honor.

The Court: All right.]

Mr. Mahony: Mr. Clerk, I understand his Honor is admitting those.

The Court: [To jury] I am admitting two of these pictures in the light of the witness's testimony. Their weight is for you, and I am not passing upon them, and Mr. Prendergast has full permission to cross-examine thoroughly, and you do also, Mr. Daley.

Mr. Prendergast: The writing on the back is out, is it?

The Court: Yes. I don't think you have any objection to that, Mr. Mahony?

Mr. Mahony: I will have it erased after I have finished my examination of this witness.

[Two photographs marked Hobart G-3, and G-4, respectively.]

X-Q. [By Mr. Mahony] Now, with reference to—

The Court: Those are two photographs in the group I had excluded.

Redirect Examination by Mr. Mahony

Q. With reference to Exhibit G-3, how far from the Acton-Concord line was the part of the road shown in that photograph? [589] A. 980 feet, sir.

The Court: Let me ask you this, Mr. Mahony. I am doing it because I am a little bit cloudy myself. I haven't been up that way for a long while. I understand when you say the Acton-Concord line that is the line nearer to Boston, isn't it?

Mr. Mahony: It's the line—Concord is nearer to Boston than Acton.

The Court: Yes, Concord is nearer to Boston; so when you are going toward Acton you are going away; is that right?

Mr. Mahony: That is right.

The Court: That's right. So that the jury will have that in mind. In going toward Acton you are going west.

Mr. Mahony: I will bring that out.

Q. The area in this photograph is 980 feet east of the Acton line; is that what you say,—isn't it? A. Correct.

Q. And the photograph is taken in what direction: looking towards Acton or looking back towards Concord? A. Looking towards Acton, sir.

Q. That would be looking west? A. Right.

Mr. Mahony: I have no objection to that [pointing]. Do you want "looking toward Acton" struck out, too? [590] Mr. Prendergast: If that's all there is on the back, I don't think that is objectionable.

Mr. Mahony: That's all.

Mr. Prendergast: All right.

Q. Now, on this Exhibit G-4, the area shown in that

photograph was how far from the Acton line? A. 477 feet, sir.

Q. And that, too, is looking towards Acton? A. Looking towards Acton, yes.

Mr. Mahony: [To jury] These photographs are called to your attention as you pass them around, Mr. Foreman, Exhibit G-4 is 477 feet from the Acton line, and I call your attention to, first, the sign, and then the excavation which is beyond the sign; and in Exhibit G-3, which is 980 feet from the Acton line, I call your attention to the sign and the excavation just beyond the sign.

[Jury examine photographs.]

Mr. Prendergast: Let me have these exhibits. Are you through?

Mr. Mahony: Yes.

Recross-Examination by Mr. Prendergast

X-Q. When was this writing put on the pictures? A. Yesterday morning, sir.

X-Q. Yesterday morning. Yesterday morning you go out and put the writing on the back of the pictures; is that right? [591] A. That is correct, sir.

X-Q. Irrespective of what the measurements on the back of these pictures are, was there anything on the northerly lane of the highway between the alleged excavation that you have mentioned as 400 and some feet east of the one shown in this picture by way of excavation from the point 470 feet or so away up to that sign "Drive Slow" the next night when you got there, or that afternoon when you got there? A. No, sir.

X-Q. No. The lane on the right-hand side from this sign on Exhibit S "DRIVE SLOW", back up to the excavation that you said was 400 and some feet up the street, that lane was available for traffic as far as any construction on it is concerned, was it? A. Yes, sir.

Mr. Prendergast: That is all.

Mr. Mahony: That is all, Mr. Robinson. Now Mrs. Whitney.

The Witness: [To the Court] May I speak to you, sir?

The Court: The witness would like to speak to me. Would counsel have any objection?

Mr. Mahony: I haven't the slightest objection.

Mr. Prendergast: Go ahead, your Honor.

The Court: Come up.

[Witness confers with the Court at the bench.]

[592] Mr. Mahony: Now, may Mr. Robinson be excused, Mr. Prendergast?

Mr. Prendergast: Oh, I have no objections at all.

The Court: I want to say the witness made no comment about the evidence. I want to assure you of that.

Mr. Mahony: About the sewer bids?

The Court: No. He just said little things a fellow likes to hear once in a while. I know I like to hear them particularly when I know sometimes you hear the other. Nothing to do with the evidence, I want to assure counsel of that, and nothing to do with any function because I never met him before.

LILLIAN WHITNEY, Resumed

Direct Examination by Mr. Mahony, Continued.

Q. Mrs. Whitney, as you were in the car which your husband was driving and coming up to a point about a thousand feet or so of where the accident happened, in what part of the road was your husband driving? A. We were driving in the middle lane.

Q. And do you remember where, about how far from the point of the accident, you first began driving in the middle lane? A. It was right after we left the Concord road.

Mr. Prendergast: It is hard to hear you, Mrs. Whitney.

The Court: She said, "It was right after we left the Concord road."

[593] Q. But some distance after leaving the Concord rotary he was driving what lane? A. The middle lane.

Q. All right. Now, at any time before this collision between the truck and the Hobart car did you see the Hobart car? A. Yes, I did.

Q. And where was the Hobart car when,—well, take it a thousand feet, 900 feet from the point of the accident, 900 feet east; for that 900 feet up to the point of the accident in what part of the road was the Hobart car traveling? A. He was driving in the middle of the road.

Q. The middle lane? A. The middle lane.

Q. And about how far ahead of you was he? A. He was three or four carlengths.

Q. And at any time before the collision between the truck and the Hobart car did you see the truck? A. Yes, I did.

Q. And where was the truck when you first saw it? A. He was in the extreme, our extreme left lane.

Q. Let me have that. "Our extreme left"—

Mr. Prendergast: She said "in our extreme left lane."

Q. "Left lane"? A. Yes.

Q. That is, as you were proceeding west it was your extreme [594] left lane? A. That is right.

Q. That would be the lane in which easterly bound traffic was traveling? A. Yes, sir.

Q. So that at that point he was in the most southerly lane traveling east and you were in the middle lane traveling west? A. Yes.

Mr. Daley: "He" means the truck driver?

Mr. Mahony: That's right, the truck driver.

Q. Now will you tell the Court and jury just what you saw take place from that point on?

Mr. Prendergast: Well, now,—I don't mind if she is telling what she saw, but I hope the witness is—I will ask your Honor to instruct the witness she is not in any way, shape or manner to give us any conversation she had with her husband, if she had any.

Mr. Mahony: I haven't asked for that.

Mr. Prendergast: She may in the way of the general question you ask her, and I don't want to interrupt her answer.

Q. Just what you saw take place from that point on, or that time on. A. When I saw the truck in the extreme left lane I saw him start over the white line.

Q. When you say start over the white line, between what two [595] lanes? A. Between the middle lane and the southerly lane.

Q. All right. You saw him start over that white line? A. Yes, sir.

Q. Go ahead. A. I made the comment to my husband—

Mr. Prendergast: No, no, that's what I was afraid of.

Q. Never mind what you said to your husband.

The Court: Just disregard that.

Q. Tell us what you saw. A. He kept on coming more over the white line into the middle lane.

Q. Go on and tell just what you saw. A. And when he was about straddling the white lane, the white line, he came in contact with the Hobart car.

Q. And how much of his truck was in the middle lane at the time of the contact between the truck and the Hobart car? A. I would say just about half of it.

Q. What happened to the Hobart car at the time of that collision? A. He was struck out of the way.

Q. He was what? A. He was pushed out of the way.

Mr. Prendergast: No, I object to that. Let her describe the movements.

[596] Q. What happened to the Hobart car at the time

or immediately following that contact of the collision? A. Well, sir, I saw the truck hit the car, but then I was thrown forward and I didn't see what happened to the Hobart car.

Q. Now, after the contact between the truck and the Hobart car what next took place? A. I saw the truck coming at us.

Q. What happened then? A. He hit us.

Q. And where was your car when the truck hit you? A. We were in the middle lane.

Q. And what part of the truck hit the Whitney car, the car your husband was driving? A. The right side of the truck hit the left side of our car.

Q. What happened to your car then? A. We were pushed around and up against the fence.

Q. Did anything happen to you? A. Yes, sir.

Q. What? A. I had a laceration over the left eye, and I had abrasions on my nose, and I had injuries on my head.

[Recess from 11:30 a.m. to 12 o'clock Noon.]

Mr. Mahony: You may examine.

[97] *Cross-Examination by Mr. Prendergast*

X-Q. You were sitting in the right front seat? A. That's right.

X-Q. Do you drive? A. Yes, sir.

X-Q. You were coming from Boston? A. That's right.

X-Q. Your husband was in the car with you and he was driving? A. That's right.

X-Q. Were you in any hurry to get home that afternoon? A. No, we weren't, sir.

X-Q. Well, at some time you got behind the Hobart car? A. That's right.

X-Q. And was that before or after you reached the Concord circle? A. I couldn't say, sir.

X-Q. When is the first memory you have now of where the Hobart car was when you first saw it? A. I think it was just after the Concord rotary.

X-Q. All right. Now, you say the car you were in was being operated in the middle lane? A. That's right.

X-Q. Behind the car that you later learned was Dr. Hobart's; is that right? A. That's right.

X-Q. And I suppose that after you left the Concord circle and [598] were driving along nothing was bothering you at all as far as the operation of your motor vehicle was concerned? A. No; no, sir.

X-Q. And I suppose you were carrying on perhaps some conversation with your husband? A. Perhaps, yes.

X-Q. And at some time you started coming down the grade? A. That's right.

X-Q. Now, as you started coming down the grade would you say you were 50 feet behind the Hobart car? A. Approximately, yes.

X-Q. Well, now, if you want to change that or add to that distance you go ahead and do it because we want to get the facts. A. No, that's about right.

X-Q. All right. And, incidentally, I suppose you and your husband have talked this case over many times since the date of this accident? A. Yes, we discussed it.

X-Q. I suppose you have talked it over every single day since you first came in here as a witness? A. Not as to how the accident happened.

X-Q. I didn't say what you were talking about other than you were discussing the accident? A. Yes.

X-Q. And I suppose that every day after you left you discussed [599] what went on and what the testimony was? A. Yes.

X-Q. That is right, isn't it? A. Yes.

X-Q. Well, now, where in the highway— You were sitting on the right-hand side? A. Yes, sir.

X-Q. Now, there was a line between the extreme right lane and the middle lane, white line? A. Yes, sir.

X-Q. Can you tell the Court and jury how close to that line the right side of your car was? A. Is that coming down the hill?

X-Q. As you were going down the hill in the direction of Acton. A. I would say we were right next to it.

X-Q. Right next to it. And you mean by that at the most the wheels of your car were a matter of an inch or two near the line? A. Yes.

X-Q. And you would say you were going along at about what speed at the top or the crest of the hill there, we'll say 700 feet up? A. Oh, I would say between 25 and 30 miles an hour.

X-Q. And that is, you were on Route 2 that day and heading for Acton about half past one and you were only going around 25 miles an hour? A. That's right.

[600] X-Q. All right. Now, then, you saw the Hobart car directly in front of you? A. That's right.

X-Q. As you were going down the grade. And where was the right side of his car in relation to the white line on his right? A. It was right next to it I should say.

X-Q. About the same position your car was? A. That's right.

X-Q. Well, now, what were you doing as you came along: watching the Hobart car continuously or not? A. Not entirely, no.

X-Q. Well, at some time now you saw the truck? A. That's right.

X-Q. Now, when you saw the truck it was coming towards you, that is, going in the opposite direction to you? A. That's right.

X-Q. And it was over on its own side of the road? A. That's right.

X-Q. Now, there isn't the slightest doubt about that in

your opinion, is there? A. No, not when I first saw the truck.

X-Q. Now, from the time you first saw the truck over on its own side of the road you were how far away from the truck, as near as you can give it, and I'm going to try to make you be specific about that? That is, perhaps it would be easier if I were [601] to say this to you. Just imagine yourself now sitting in your car. There's the back of the Hobart car down the wall on the court there [pointing]. Now, was the truck twice as far away as the Hobart car, or was it further or closer? A. I'd say it was further away.

X-Q. All right. So it was over a hundred feet away from you? A. Yes.

X-Q. All right. And it was over on its own side of the road; that's right, is it? A. Yes.

X-Q. Well, in that 150 feet now that's between you and the truck you could see the road on the left of you, couldn't you? A. Yes.

X-Q. You could see the lane directly on the left of you, couldn't you? A. Yes.

X-Q. In fact, from the time you came down from the crest of the hill you could see the road on your left, couldn't you,—the lane on your left? A. That's right.

X-Q. Did you see a single thing in that lane— A. There was—

X-Q. Wait a minute now. —which would obstruct the progress of that truck on that lane if the truck kept going ahead on the lane? [602] A. No, sir.

X-Q. Then you could see no reason—

Mr. Prendergast: I withdraw that.

X-Q. There was nothing on the lane that you could observe that required the truck to turn to its left, was there? A. No, there wasn't.

X-Q. No. At the time you saw the truck 150 feet ahead

of you and the automobile 100 feet ahead of you, you and the automobile ahead of you were going straight along towards Acton; that's right, isn't it? A. That's right.

X-Q. And you were traveling 25 miles an hour—did you say? A. Between 25 and 30.

X-Q. Between 25 and 30, all right. Well, just because the figures are easier using 30, let me suggest this to you. Traveling 30 miles an hour you go 45 feet in a second an automobile does. Now, from the time you first saw this truck up until the time the accident happened was less than three seconds, wasn't it? A. If that calculation is right.

X-Q. If the calculation is right. And for once during the course of this trial I think I will agree I am very close to being right.

Mr. Mahony: Approximately.

Mr. Prendergast: He would qualify it!

X-Q. All right. So now within three seconds or approximately [603] three seconds of the time you saw the truck for the first time the accident happened, didn't it? A. Yes.

X-Q. Now, you have heard your husband's testimony? A. Yes, sir.

X-Q. And, as you say, you have been talking with him many times about the happening of this accident from the day it happened up to now? A. That's right.

X-Q. Then you, too, saw the Dr. Hobart car turn to the left, did you? A. From where?

X-Q. I'm not suggesting from or to. You saw the Dr. Hobart car turn to its left; didn't you? A. I couldn't say that I did, sir.

X-Q. You heard your husband say it did? A. Yes, sir.

X-Q. And having heard your husband say he did on the witness stand here,— A. Yes, sir.

X-Q. —did he say it on other occasions from the time of that accident up until now when you discussed it?

Mr. Mahony: Objection.

Mr. Prendergast: All right, leave it out.

X-Q. You heard him saying it? [604] A. Yes.

X-Q. Will you say that the Hobart car did not turn to its left at any time? A. No, I will not.

The Court: I did not get the answer.

Mr. Prendergast: She will not say it did not turn to its left.

The Court: I didn't ask that for the purpose of getting the answer. I wanted to be certain, and I lay no emphasis on the answer. I want to be sure I hear all the evidence.

Mr. Prendergast: That is all.

Mr. Daley: Just a second.

[Counsel confer.]

Mr. Prendergast: This suggestion is made, and I will ask it.

X-Q. You didn't see the right front of the truck hit the left front of Dr. Hobart's car, did you—the right front of the truck now. A. No, I didn't.

Mr. Prendergast: That's all.

Mr. Mahony: I think that's all, Mrs. Whitney.

The Court: That is all, Mrs. Whitney.

[605] Mr. Buzzell: Dr. Hobart, will you take the stand again, please.

DR. HAROLD M. HOBART, Resumed.

Direct Examination by Mr. Buzzell, Continued.

Q. Now, Doctor, you have already testified here during the trial, stating your name, residence, and occupation. Will you tell us briefly what your medical education was? A. I graduated from George Washington University in medicine in 1936 and interned at the Municipal Hospital in Washington and spent two and a half years in pediatric training at

the Children's Hospital in Washington and at the Willard Parker Hospital in New York City.

Q. And since you completed your internship and training in pediatrics what have you been doing? A. I have been practising pediatrics in Washington.

Q. Private practice? A. Yes, sir.

Q. And that would be for how long a period since you completed your training? A. Since 1940.

Q. 1940. And you have been continuously in practice in Washington in that field up to the present time? A. Yes, sir.

The Court: That is baby practice, isn't it, Doctor?

The Witness: Yes, sir.

[696] The Court: Infants?

The Witness: Yes, sir.

The Court: Children.

Q. Not delivering babies but taking care of them? A. Yes, sir.

Mr. Prendergast: Well, some of us take care of babies that are much bigger than that.

The Court: I wonder who he is talking about?

Q. Now, Doctor, you made some answer when you testified previously about some meetings or lectures of some kind which you attended at the Massachusetts General just prior to this accident? A. Yes, sir, I attended lectures for two weeks prior to this accident at the Massachusetts General Hospital.

Q. Lectures in your field of pediatrics? A. Yes, sir.

Q. Now, on the morning of the accident you have already described how you and Mrs. Hobart started out to ride to Concord. What kind of a day was it? A. It was a bright day, a very clear day, a very warm day. The temperature, I think, was between 90 and 100, if I recall.

Q. And, as I recall the time, the accident took place

some time between one and two on June 21? A. Yes, that is correct.

[607] Q. Now, at some time as you were proceeding along Route 2 in a westerly direction—well, starting, we'll say, from this Concord rotary which has been referred to here—what kind of a road was it as to its size and width? A. It's a three-lane highway.

Q. Three-lane highway? A. Yes, sir.

Q. Now, at any point did you notice any obstruction in your right-hand or north-bound lane, prior to the accident? A. The northbound lane was closed to travel in the area which I judge, I think I submitted, was about a quarter of a mile before the accident.

Mr. Prendergast: May that be stricken out?

The Court: May I have it read.

[Answer read.] I think I will strike it out. The jury will disregard that entirely.

Q. Just describe, if you will, anything which you noticed in that right or northbound lane.

Mr. Prendergast: Which? Northbound?

Mr. Buzzell: No, north lane westbound.

A. There was evidence of construction and dirt in the north lane and, as I recall, some materials and tools that were being used at the time for road construction.

Q. According to your best recollection, how far prior to the point of the accident did you notice any obstructions in the [608] highway? A. As I recall, at least a quarter of a mile.

Q. And at that point and from that point on what portion of the highway were you driving in? A. I didn't get it.

Q. At that point and from that point on what portion of the highway were you driving in? A. I was traveling in the center lane.

Q. Now, as you were proceeding along westerly in the center lane, at some point did you notice a truck approach-

ing in the opposite direction, that is, eastbound? A. Yes, sir.

Q. What is your best recollection as to the distance between your car and the truck at the time you first noticed it? A. I estimate it about 50 to 100 yards.

Q. 50 to 100 yards? And, according to your best recollection, in what part of the highway was the truck moving when you first noticed it? A. It was in the southbound lane.

Q. That is, in the lane on your left? A. That is right.

Q. The eastbound lane? A. Yes.

Q. And at that point, as you say, it was some 50 to 100 yards away from the car? A. I would estimate that.

[609] Q. Now, from that point on will you describe anything which you observed as to the course of the truck? A. When he approached me he was—when he got within about four or five carlengths the truck left the lane and came toward me at an angle, came over into my lane,—I would judge about half the width of the truck, and the driver's side, the left side of the truck struck the left side of the car I was driving.

Q. Now, at the point of when you first saw him come over, as you have testified, into your lane, what, if anything, did you do in the operation of your car? A. I applied my brakes. I was unable to turn into the right lane because of the obstruction there, some piles of dirt, and we immediately made contact with the truck.

Q. I think you stated when you first saw the truck start over into your lane it was, according to your best memory, four or five carlengths away? A. I would judge that.

Q. What is your best estimate as to your own speed at the time you first saw the truck start into your lane? A. I would judge about 30 miles an hour.

Q. What is your best estimate as to the speed of the truck at that point? A. Between 40 and 50 miles an hour.

Q. Now, what is your best estimate of the speed of your car at the moment of the contact between your car and the truck? [610] A. I believe it was practically stopped.

Mr. Prendergast: May that go out, your Honor?

Mr. Buzzell: I think it is responsive, if your Honor, please.

Mr. Prendergast: He was asked the speed at the time of the accident.

The Court: It was not responsive to the question, Mr. Buzzell. I will order it stricken.

Mr. Buzzell: He wasn't moving.

Mr. Prendergast: He says he was practically stopped.

Mr. Buzzell: All right, let's have it more specific.

Q. How fast, if at all, do you think you were moving?

Mr. Prendergast: I pray your Honor's judgment. Not how fast if at all. He has already said he was practically stopped. That means movement.

Mr. Buzzell: I want to find out what it does mean.

Mr. Prendergast: All right.

Mr. Buzzell: Let the witness say.

The Court: All right. [To witness.] How fast were you going?

The Witness: Five miles an hour.

Q. What is your best estimate of the speed at which the truck was moving at the moment of the impact? A. Between 40 and 50 miles an hour.

Q. Now, just describe to the jury what happened next following [611] the impact of the two cars, Doctor. A. The truck swerved over to his left. Our car was pushed around to the left, the rear against the fence, and the truck was almost parallel with our car, with his head against the fence on the left side of the road. That would be on the—

Q. Let us use north and south. A. —north side of the road.

Q. North side of the road. All right. Now,—

The Court: I think we will pause here and the jury will come back at quarter past two.

(Recess from 1 p.m. to 2:15 p.m.)

[612] AFTERNOON SESSION

DR. HAROLD M. HOBART, Resumed.

Direct Examination by Mr. Bassell, Continued.

Q. Doctor, will you state, at the moment of impact between your car and the truck, what the position of your car was in the road with reference to these lanes you have described? A. In the center lane.

Q. And will you state where the right-hand, or let's say the north side wheels of your car were with reference to the north side line of the center lane at the moment of impact. A. I would judge a foot from the edge of the lane.

Q. Now, Doctor, whether or not at any time just preceding the impact or the collision whether you had turned your car towards his left? A. No, sir.

Q. You have already testified that the position of your car when it came to rest was that its rear was against the highway fence on the north side of the road? A. That is right.

Q. Now, can you see this picture over here from where you are, which is Plaintiff's Exhibit 5? A. Yes, sir.

Q. And is that a fair representation of the position and condition of your car following the collision? A. Yes, sir.

[613] Q. And is that a fair representation of the position of the truck as it came to rest after the accident? A. Yes, sir.

Q. And when your car came to rest and when the truck came to rest where were you? A. I was behind the wheel of my car.

Q. Still behind the wheel of your car? A. Yes, sir.

Q. At that point whether or not you had occasion to observe Mr. O'Brien? A. Yes, I looked out the window of the car and I saw him over in the cab of his truck.

Q. And in what part of the cab of his truck did you see him? A. Behind the wheel.

Q. What was his position? A. He was in upright position.

Q. Now will you describe the position of the steering wheel of your car after it came to rest following the collision? A. The steering wheel was pushed forward and upward.

Q. How far? A. The top of the steering wheel was within a couple of inches of the windshield, I would say.

Q. At some point did you get out of your car? A. Yes, sir.

Q. Was that before or after the State Police officers arrived? [614] A. It was after they arrived.

Q. And, according to your best recollection, how long after the accident was it before the first State Police officer arrived on the scene? A. Well, it seemed to be within two or three minutes.

Q. And when you eventually got out of your car, out of which door did you get? A. The driver's side of the car, on the left side.

Mr. Daley: I didn't hear that answer. On the driver's side of the car?

The Witness: Yes, sir.

Q. On your side? A. Yes.

Q. Now, will you describe to the jury anything you recall in regard to your own condition or your own feelings immediately following that,—your own physical feelings, I mean, immediately following the collision, after the car came to rest? A. After the collision I felt a great deal of chest pain and a feeling of fainting. Those were the two out-

standing feelings that I had after the accident. I had a feeling of being hurt in the chest and in the abdomen, and the pain was quite severe in the chest, and breathing was difficult.

Q. Now, what happened first after that? Where did you go? A. The police officer helped me out of the car—

Mr. Daley: Where did you go, Doctor—that's [615] the question, Doctor—that's the question.

The Witness: I was taken to the—put in back of the police car and taken to Emerson Hospital.

Q. And how long did you remain there? A. We were there just, probably, less than an hour. It didn't seem longer than that. About an hour, perhaps.

Q. Was there anything done for you in the way of treatment or anything of that sort at the Emerson Hospital? A. No. The doctor noticed me and passed by, and we were transferred to the Massachusetts General. The doctor thought it would be all right to go.

Q. And at some time were you taken to the Massachusetts General? A. Yes, sir.

Q. From the Emerson Hospital? A. Yes, sir.

Q. In what way were you taken from the Emerson Hospital? A. We were taken in an ambulance.

Q. That was some ambulance of the Town of Concord? A. Yes, sir.

Q. Did anybody go with you in the ambulance on that trip? A. Besides the driver was Mrs. Hobart.

Q. Mrs. Hobart was also a physician? A. Yes.

Q. And, if you recall, about what time did you arrive at the [616] Massachusetts General Hospital? A. I think it was about three o'clock, or between three and four. It may have been sooner than that, I'm not sure.

Q. Now, what do you recall, Doctor, during the time between what you described just following the accident at the time of your arrival at the Massachusetts General

Hospital, as to your physical feelings and physical sensation? A. Well, while we were going into Boston I had a feeling of a good deal of distress and chest pain and difficulty in breathing and, naturally, a feeling that I was—that I had a good deal of chest injury.

Q. Was some examination made about as soon as you arrived in the hospital in Boston? A. Yes, there were nurses and a physician in the accident room when I arrived.

Q. Now, according to your own recollection as best you can recall it, what did you receive in the way of treatment as distinguished from examination at arrival?

Mr. Daley: Would it be helpful, Mr. Buzzell, if I agreed this witness would give you what is in the hospital record?

Mr. Buzzell: For the most part, yes. I'm not going to take much time on it.

Mr. Daley: I don't object. I am trying to shorten it up, and I thought that might be an agreeable way.

[616a] Mr. Buzzell: Yes.

Q. Take that first, immediately on your admission and examination. What do you recall, Doctor, as to any actual treatment which you received? A. We were—I was taken into the accident room and was observed by the resident physician, and Dr. Waddell came in in a short time, within a few minutes, and saw me and there was no specific treatment, like that, except careful observation. [617] I was admitted to the ward that same afternoon, and X-rays were taken, and laboratory examinations, and I was made comfortable in bed with sedation. And that was the extent of the treatment, as I recall, that first day.

Q. Now, I am making it more specific, Doctor. When the hospital record was read I noticed that there was an order of "nothing by mouth," and in what way, if at all, did you receive any nourishment immediately following your admission to the hospital or the very next day or two? A. Well, the order of "nothing"—I didn't receive any-

thing by mouth that first day but I received fluid intravenously, that is, by vein.

Q. That is to say, by having a syringe of some kind inserted in a vein? A. That is right.

Q. Connected by rubber tube to a jar with some sort of solution? A. That's right.

Q. Do you have any recollection of the length of time that each feeding took, that is, to exhaust what was in the jar,—in other words, the entry of the solution into your vein? A. I had that—I took fluid by that way for the first day or two, first couple of days, and after they operated on me the following day. I don't recall exactly how long it was, but it was twenty-four or forty-eight hours.

Q. Do you have any recollection as to how much of that time [618] you had this syringe in your vein and the fluid dropping in? A. Well, I probably had a quart or two every day; one or two quarts a day.

Q. Two quarts a day? A. Something like that.

Q. Was there anything other than just a saline solution? A. They have glucose in it at times.

Q. When you say two quarts a day you mean saline and glucose both? A. That's right.

[Discussion off the record.]

Q. On the second day, Doctor, describe what other sensations you recall with respect to pain? A. There were about the same sensations of pain. I had pain in the chest, pain in the abdomen, and a great deal of discomfort in lying down and making myself comfortable lying down as far as the chest pain was concerned.

Q. As I understand it, some time during the day following the accident you were operated upon? A. That's right.

Q. Do you recall whether that was the morning or afternoon? A. It was around one o'clock, something like that. It was late in the morning or early afternoon. It was the middle of the day.

Q. Now, there has been some reference here to a rubber tube [619] which was put in some place. A. I think that was put in during the operation because I had it in my nose when I came down from the operating room.

Q. You don't recall having it put in? A. No.

Q. You do recall having it in there I presume? A. Very definitely.

Q. And that is a tube inserted through one nostril, is it, Doctor? A. That's right. Down into the stomach. Suction.

Q. And then the other end of the tube is connected with some sort of apparatus, is it? A. Yes, for suction purposes.

Q. Keeping the stomach free of gas, and so forth, following an operation? A. That's right.

Q. And I think the record shows that was in around two days, was it? A. I think that is correct.

Q. Is that about right? A. Yes.

Q. Now, according to the best of your recollection, at what point or how long after you had been in the hospital did you begin to feel better as far as this chest pain was concerned? A. I felt a good deal better after the first week, ten days.

[620] Q. And at the time you were discharged from the hospital, which, as I recall the record, was July 3d—is that right? A. What's that?

Q. You were discharged, according to the record, around the 3d of July? A. Right.

Q. What was your condition with respect to pain at that time? A. I was feeling a lot better. I was quite weak from the abdominal operation that I had, and I had still some difficulty in deep breathing, but I still had some pain when I was lying down because of pressure on my chest, just the weight of the chest seemed to produce pain, and I was more comfortable sitting up or standing up.

Q. How long did those sensations persist, Doctor, after you left the hospital? A. They persisted during the sum-

mer, quite severely up through—interfered with sleep through the month of July, and even in the first part of August I had some chest pain, and it didn't leave entirely until later in the fall, until around the first of November. However, even now I have some pain in the upper sternum area which has been described in the court as the sterno-clavicular junction, particularly on motion.

Q. When do you recall first noticing any pain in that particular region following this accident? A. Well, that pain persisted from the time of the accident and [621] is the only part that hasn't cleared up completely.

Q. That is the only part of the chest, you say, that has not cleared up completely? A. That is right.

Q. Now, which side is that on: the right or the left? A. It is on the right side.

Q. And some mention has been made here of an incisional hernia. Will you describe that? A. In September of the same year 1952, I noticed a herniation or bulging in the region, at the site of incision, and which is about the size of my thumb, and that has persisted since the operation and increased in size a little, but has remained about the same for the last year or so. It's a hernia and causes some discomfort, especially with exercise, but only some discomfort and not—I wouldn't describe it as painful.

Q. And is it something that is fairly readily reduced when it appears? A. I didn't understand.

Q. Is it fairly readily reduced when it appears? A. Yes.

Q. Up to date you have had nothing done with regard to repairing it? A. No, I haven't had anything done. I consulted Dr. Waddell about it—

Mr. Daley: His answer is No on that question.

[622] Q. Now, you stated you were in private practice, Doctor, for—I guess it was about twelve years prior to the accident; that you began your private practice in 1940, as I recall it? A. That's right.

Q. Now, for the year preceding the accident what were your average weekly earnings from practice? And I mean the net earnings after deducting office expenses. A. Oh, about $500 a week.

Q. That was about the average? A. Yes.

Q. Now, how long was it following the accident before you returned to your work and your practice? A. I believe it was the 5th of August when I went back into the office.

Q. The 5th of August? A. Yes.

Q. And at that time did you go back to work full time? A. Yes, sir.

Q. About how much time did you work,—I mean, what part of the full day did you go in following the 5th of August, when you first went to work? A. I resumed my activity about 50 per cent of what I would ordinarily do.

Q. And how long following the 5th of August did you continue your work for about half a day? [623] A. Until about the 1st of November of the same year.

Q. Following that you went back to work full time? A. Yes.

Q. And have been working full time since then? A. No.

Q. And aside from the chest pain, the chest injury which you described, do you recall any other marks, anything on your body that appeared following the accident? A. I had some bruises on my left thigh and over the hip area, and I believe there was a bruise on my forehead.

Q. Whether or not there was any pain or discomfort you experienced that was related to either one of those bruises that you describe? A. There was pain and discomfort for a couple of weeks from the thigh.

Q. From the thigh? A. Yes.

Q. And did that clear up? A. Yes.

Q. You have had nothing from that subsequently? A. That is right.

Mr. Buzzell: You may inquire.

Cross-Examination by Mr. Daley

X-Q. Doctor, you told us, as I recall your evidence, that you had been in Boston a period of about two weeks before the date [624] when you had your accident, attending courses at the Mass. General Hospital? A. That is right.

X-Q. Can you identify any more definitely the date when you left Washington to come to Boston than approximating two weeks? A. I can give the exact date. It was—if you let me take a minute. [Pause.] The accident was on the 21st, and it was the—I was—I came to Boston—let's see. The first Monday was the Monday previous. That would be the second Monday previous to the accident.

X-Q. Monday, two weeks. The accident happened on Saturday? A. That's right.

X-Q. And fourteen days before the Saturday would have been the 7th of June, wouldn't it? A. That's right.

X-Q. And you are telling us you came to Boston the Monday of the week in which the 7th of June was a Saturday? A. I think that—

Mr. Buzzell: No.

Mr. Daley: Well, he said he did.

X-Q. Am I correct? A. I think that is right.

X-Q. All right. So you were in Boston two days short of three weeks from the day on which you had your accident, according to what you just told us? [625] A. Well, I can't give the exact date.

X-Q. Is that your best memory? A. That's right.

X-Q. All right. Now, your purpose in coming to Boston was to attend some courses at the Massachusetts General Hospital? A. That's right.

X-Q. Did your wife come with you when you first came here? A. No.

X-Q. She joined you at some later date? A. That's right.

X-Q. Did you drive to Boston in the automobile that was involved in the accident? A. No.

X-Q. Your wife drove it? A. Yes.

X-Q. And how long approximately was it from the date you had this accident your wife joined you in Boston? A. The day before.

X-Q. The day before? A. That's right.

X-Q. Now, Saturday, June 21st, you have told us you attended the concluding lecture of the course at Massachusetts General Hospital? A. That's right.

X-Q. And when you left in the morning to go to the Massachusetts [626] General Hospital you left the boarding house where you had been staying? A. That's right.

X-Q. Was your wife with you when you started down to the Massachusetts General Hospital that morning? A. No.

X-Q. Did she meet you at the Mass. General Hospital after your lecture was over and before you started on your way to Vermont? A. That's right.

X-Q. She apparently drove the car in from the boarding house to the hospital? A. That's right.

X-Q. And when you left the hospital in your automobile and started over the road you were behind the wheel? A. That's right.

X-Q. And there was no special arrangement about the circumstances under which you were driving the car: you simply drove and she was a passenger in it? A. That's right.

X-Q. To be sure we understand each other, no special talk took place between you and her that you can recall about who should drive or why you were at the wheel? A. No, sir.

X-Q. All right. Now, sir, this automobile was registered in your wife's name, wasn't it? [627] A. It was.

X-Q. Whose property was it? Who owned the automobile? A. Mrs. Hobart.

X-Q. All right. You and she were driving or intended

to drive that afternoon to a destination in Vermont? A. That's right.

X-Q. Your purpose in going to Vermont was to spend some time with a friend of yours? A. Yes, we were going up to leave some things up there, and we were going back for the summer.

X-Q. I didn't hear the last thing because of the noise. A. We were going back up there for the summer and were just leaving some things.

X-Q. You were going back up there for the summer? A. Yes.

X-Q. When you say for the summer you mean what weeks or what months, Doctor? A. We were going back in August for a month.

X-Q. You were going back for the month of August or the month of July? A. For the month of August.

X-Q. In other words, it had been your intention to take off the month of August from your practice in Washington? A. That's right.

X-Q. And spend it as a vacation period in Vermont? [628] A. That's right.

X-Q. As the event developed you spent the month of July in Vermont? A. That's right.

X-Q. Rather than August? A. That's right.

X-Q. And you practised part time at least in August rather than being away from your practice throughout the whole month of August? A. That's right.

X-Q. But your plans leaving the Massachusetts General Hospital that morning contemplated that you were to be away from your practice during the month of August? A. That's right.

X-Q. And that during those 31 days, four weeks and a half, you contemplated that you wouldn't have any income from your practice?

Mr. Buzzell: On that I will pray your Honor's judgment.

Mr. Daley: I press it.

Mr. Buzzell: We all know medical earning capacity is on a different basis.

Mr. Daley: I propose to show he deliberately had arranged not to exercise his earning capacity during that period.

[629] Mr. Buzzell: It wouldn't make any difference.

Mr. Daley: I pray your Honor's judgment.

The Court: I suppose it is diminution of earning capacity.

Mr. Daley: All right, rather than bother about it. I withdraw it.

The Court: All right.

X-Q. You had planned to take the month of August away from your practice? A. That's right.

X-Q. Now, we are talking about an incident that happened on Saturday afternoon, aren't we? A. That's right.

X-Q. You were driving over road with which, I presume, you were not too familiar? A. That's right.

X-Q. Had you ever been on that road? A. No, sir.

X-Q. But at the time when you took the stand here December 2nd you hadn't been back to visit the road or the scene of the accident? A. That's right.

X-Q. Between December 2nd and today you have never been up there? A. No, sir.

X-Q. So when you are describing this road and the incidents [630] and occurrences there you are telling us about a road on which you had never driven until the day when you had your accident; is that correct, sir? A. That's right.

X-Q. And about a road to which you have never been back from that day to this? A. That's right.

X-Q. And about a road with which you have had only

one experience, that being the date of June 21st, 1952; correct? A. That's right.

X-Q. Now, speaking about the day of June 21st, 1952, you have said, both on December 2nd, last week, and today, that as you came along you saw the tools and equipment of a construction company on the road? A. I said that I saw some tools and evidence of that lane being blocked off.

X-Q. Where, sir, were the tools you think you remember seeing on the road; specifically where with reference to the traveled part of the road were they? A. I can't tell you that.

X-Q. Were they on the traveled part of the road? A. In the right lane, I believed there were some there.

X-Q. And, to be sure there is no confusion between you and me, when you say the right lane you mean on the lane to your right as you were traveling westwardly from Concord toward [631] Acton? A. Yes.

X-Q. And we are speaking about the lane of the road and not the soft shoulder to the right of the lane, are we? A. That's right.

X-Q. And you are definite in that memory, are you, there were tools in the position— A. I think there were. I can't be sure but I think there were.

X-Q. Were you here when Mr. Robinson, from Concord, gave us evidence? A. Yes.

X-Q. You have talked with him in the corridor during this case? A. Not about the accident, sir.

X-Q. Didn't you? You have talked with him? A. Not in the corridor.

X-Q. You listened to his evidence? A. Yes, sir.

X-Q. You heard him say that on Saturday, the day of the accident, there was no work being conducted on the road or adjacent to it by the people that were doing the work for the town? A. Yes, sir.

X-Q. You still say tools were lying on the right-hand

side of the road as you came along? A. I may be mistaken.

X-Q. Aren't you? [632] A. I don't know.

X-Q. Well, coming on this road, do you recollect passing over the top of the hill, down grade, traveling down grade to the point where you had your accident? A. I didn't recollect it at the time.

X-Q. When did you first remember back to a situation where you can recall that there was a grade? A. I didn't recollect a grade there at all as I was going along.

X-Q. What's your present memory about whether there was a grade there or not? A. I didn't remember of one being there.

X-Q. Standing on the witness stand and answering my questions now, do you remember there was a grade there? A. No.

X-Q. The only thing you can tell about a grade is that you heard other witnesses say that such a grade existed on the road; that's it, isn't it? A. That's right.

X-Q. So far as your memory, Dr. Hobart's memory is concerned, you have nothing by which you could tell the jury whether there was a grade or which way it ran, can you? A. I couldn't tell them, no.

X-Q. So that if I talk about the top of the grade, that does not identify any place in the road to you, does it? [633] A. No, sir.

X-Q. Well, if I asked you to think of a distance about 300 yards back from the place where you were in collision with the truck, could you identify that place in your mind regardless of the grade? A. I identify it from the fact that we had to use the center lane in order to travel.

X-Q. Was that the first time in which you had to use the center lane for travel? A. I estimated the distance—

X-Q. Please, Doctor, the question is this. As you came along the road was that the first occasion, 300 yards, on the supposition I give you, back from the scene of the

collision that you had to use the center lane—to use your expression? A. I think that was about right.

X-Q. Now, you are telling this jury that, according to your memory on the witness stand, as you drove from Boston there was nothing in the road that you remember that caused you to use the center lane until you reached a point about 300 yards back from your collision; that is correct, is it? If it isn't, you correct me. A. That's right.

X-Q. All right. And until you reached this point 300 yards or thereabouts back from the place of the accident, in what part of the road were you driving—with reference to lanes? [634] A. I was traveling in the right available lane, whichever one that was.

X-Q. Well, until you reached the first construction work, the right available lane was the extreme right lane of the three-lane road, wasn't it? A. Yes.

X-Q. What? A. Yes.

X-Q. And when you answered the question you were in the right available lane, that can be translated for the jury into a statement that you were traveling in the extreme right-hand lane of the three-lane road up to that point? A. That's right.

X-Q. All right. Then do I understand that when you reached this construction we have identified tentatively as 300 yards that you then went into some other lane? A. I used, I was using the center lane as I approached the construction.

X-Q. Can you be any more definite in any way, Doctor, as to how far back from the place where you had your accident you were when you turned from the extreme right-hand lane into the center lane of the road? A. I don't know, sir. I made an estimate in previous testimony as a quarter of a mile. That is my best recollection.

X-Q. I asked you do you remember you made that estimate? [635] A. I think I did, sir.

X-Q. Is that the only estimate you remember you made the other day as to the distance in question? A. I believe that is correct.

X-Q. Well, you got into the center lane of the road at some point? A. That's right.

X-Q. And as of this minute what is your best memory of the distance between the place where your accident happened and the place where you first got into the center lane? A. I judge about a quarter of a mile.

X-Q. A quarter of a mile? A. I think that was my estimate on that.

X-Q. Doctor, with deference to you, this isn't a matter that you are reconstructing from question to question, is it? A. Well, I made the estimate.

X-Q. Please answer it. Are you reconstructing all your answers from question to question? A. I'm trying to tell the exact truth as I know it.

X-Q. Well, you have already told me within a matter of five minutes it was 300 yards, haven't you,—from the place where your accident happened to the place where you turned into the center lane? A. Yes, I guess I did.

X-Q. And 300 yards is different from your present estimate of [636] a quarter of a mile, isn't it? A. There is some difference.

X-Q. There's a whole lot, isn't there?

[Discussion off the record.]

X-Q. When these gentlemen get through, you will agree with me there is quite a bit of difference, Doctor? A. Yes.

X-Q. Well, which is it? A. Those are estimates, sir.

X-Q. Well, they are two entirely different estimates, aren't they? A. A quarter of a mile was my figure.

X-Q. Still is? A. Yes, sir.

X-Q. All right, sir. Well, when you got into that center lane you had an unobstructed view of what was coming

towards you from the opposite direction, didn't you? A. Yes, sir.

X-Q. Because the road is straight, isn't it? A. Yes, sir.

X-Q. And, as you look at those pictures, pretty nearly as far as the eye can see? A. That's right.

X-Q. Toward Acton? A. That's right.

[637] X-Q. And there was no grade that interfered with the view you had as you were coming toward Acton from Concord, was there? A. That's right.

X-Q. And you have told us, at the risk of repetition, the weather conditions were good? A. That's right.

X-Q. You told both Mr. Prendergast and your own lawyer that the first time you saw the truck was at a distance between 50—that you estimated—50 yards and 100 yards away from you; that is correct, isn't it? A. That's right.

X-Q. You came to realize after you had your accident that Whitney's automobile was probably in back of you; is that so? A. I knew he was traveling behind me.

X-Q. But there was nothing traveling ahead of you in your direction, was there, before this accident happened? A. No, sir.

X-Q. As far as you could see,—and I mean by that as far as the road was visible to you,—there was nothing traveling, prior to the accident, ahead of you going west in the same direction that you were? A. That's right.

X-Q. So that there was nothing by way of an automobile traveling your way, ahead of you, that permitted you from seeing the whole width of the road and any cars that might be coming in [638] the opposite direction, was there? A. No, sir.

X-Q. And yet you did not see this big truck until it was a distance that you estimated between 50 and 100 yards away from you, did you? A. That was my estimate.

X-Q. That's your estimate today, isn't it? A. Yes, sir.

X-Q. You were here, I think, earlier when we had some discussion about the length of the football field? A. Yes.

X-Q. And the length of a football field is 100 yards, isn't it? A. Yes.

X-Q. And you're telling the jury, to pin it down, that something about half the length of a football field or the whole length of a football field was the distance that separated you from the truck when you first saw the truck? A. That was estimate, sir.

X-Q. That's right, that's the best estimate you can give? A. That's right.

X-Q. And if we struck an average between the 50 and 100 yards we would arrive at 75 yards, wouldn't we? A. Yes.

X-Q. And when you gave the distance of 50 to 100 yards you meant to estimate the extreme distance nearest you and the [639] extreme distance away from you that this truck was when you first saw it? A. That's right.

X-Q. All right. Now, until that moment you were traveling at a speed of 30 miles an hour? A. That's right.

X-Q. And where were you in reference to the construction that is shown in the uppermost picture to your left when you first—in other words, the construction nearest to where the accident happened, where were you with reference to that when you first saw the truck—if you can help us. A. We were almost adjacent to it; we were just within a few feet, 10 or 15 feet, maybe; just a very short distance.

X-Q. Now, you are 10 or 15 feet from the construction when you first see this truck 50 to 100 yards away from you; correct? A. Yes.

X-Q. And you see within 10 or 15 feet of your position at that instant something on your right-hand side of the road that you've got to be careful to avoid, haven't you? A. That's right.

X-Q. What? A. That's right.

X-Q. You were driving with the right-hand wheels of your truck—

Mr. Prendergast: Car.

The Witness: Car.

[640] X-Q. Car—the right-hand wheels of your car a matter of some inches, 1 foot from the north edge of the center lane? What? A. Well, it's an estimate; yes.

X-Q. That's your estimate, sir? A. That's right.

Mr. Mahony: One foot from the center lane?

Mr. Daley: From the north edge of the center lane—that's what Mr. Buzzell asked him and his answer that I got.

X-Q. Am I correct? A. Yes.

X-Q. Incidentally, Doctor, you have no confusion in your mind that the right-hand side of your truck—your car—means the side opposite the driver? A. That's right.

X-Q. And there is no confusion in your mind the left-hand side of your car means the driver's side? A. That's right.

X-Q. And there is no confusion in your mind that the truck which you collided with was a truck in which the driver sat on his left side? A. That's right.

X-Q. And that the right-hand side of the truck with which you collided was the side opposite from the driver's seat? A. That's right.

X-Q. Now, sir, you are telling us that you reached a position [641] 10 or 15 feet back from where this construction was in the lane to your right, aren't you? A. That's right.

X-Q. At the moment when you first saw the truck; correct? A. That's right.

X-Q. And you are just going 30 miles an hour? A. Yes.

X-Q. And you are driving so that the right-hand side of your Chrysler automobile was about a foot over into the center lane from the lane that divided the center lane from the extreme northbound lane? A. I think that's about right.

X-Q. And you are telling us one other thing: that this construction or apparatus which went with the construction blocked up the whole northbound lane or right-hand lane of the road, aren't you? A. The whole lane was closed to traffic.

X-Q. We'll use your word. There was no part of that right-hand lane that you could occupy as you traveled by this place where the construction was going on, was there? A. That's right.

X-Q. And so at 30 miles an hour 10 to 15 feet back—and that's about the distance that separates me from you right now, is it? A. Yes.

X-Q. —you're driving about a foot, and that's about the [642] distance that separates this boundary line on the floor from the rail [pointing]; you're driving about this close to that construction line; aren't you? A. That's right.

X-Q. And you are driving 30 miles an hour. Or, to put it differently, the construction begins about 10 feet ahead of where you are; that's it, isn't it? A. Yes, approximately.

X-Q. And that is the first time you see a truck coming towards you? A. Yes.

X-Q. The first time. 75, or 50 to 100 yards away in the opposite direction; what? Is that correct? A. I don't quite follow you, sir.

X-Q. When you are 10 to 15 feet back where the construction,—if this [pointing] is the right-hand lane, edge of the right-hand—

Mr. Buzzell: May I suggest you identify the construction.

Mr. Daley: The only construction.

X-Q. You know the construction I am talking about, don't you? A. I think so.

X-Q. Sure you do. I'm talking about the construction that was 10 feet away from you when you first saw the

truck. That's fair, isn't it? [643] A. You asked me when I first saw the truck?

X-Q. Yes. A. I said I was 50 to 100 yards away from it.

X-Q. Away from it, away from the truck; that's right? A. Yes.

X-Q. And then I asked you where you were at that moment with reference to the construction work. A. At the moment—

X-Q. At the moment you saw the truck. A. I was farther back than 10 or 15 feet from the construction at the time I saw the truck.

X-Q. Do you want to change that? What? A. I didn't mean to change anything.

X-Q. But if I assure you— A. I think I didn't understand your question correctly.

X-Q. Can we avoid repetition in answering by my saying to you now if you don't understand my question at any time will you kindly tell me about it? A. That's exactly what I want to do.

X-Q. All right. Well, let me ask you another question I asked you earlier. At the moment that you saw the truck 50 to 100 yards away from you, where were you with reference to the construction? And lest there be any doubt about the construction to which I am referring, I am referring to this construction [pointing on photograph]. [644] A. That's right.

Mr. Prendergast: Shown on Exhibit what? 9?

Mr. Daley: 7.

Mr. Prendergast: Plaintiff's Exhibit 7.

Mr. Daley: Is there any question there? It doesn't show.

X-Q. I am referring to this excavation and this construction. I think when I asked my question you knew what I was referring to. A. I can't give you an estimate. I would

say it's back at least 100 feet,—I would say 50 or 100 feet back of that construction.

X-Q. 50 to 100 feet back toward Concord? A. I think probably in that area in there.

X-Q. Where did this accident happen with reference to this construction? A. At the construction, the distance I gave you a minute ago of 10 or 15 feet.

X-Q. So you had traveled something like 85 feet—100 feet less than 10 or 15 feet—from the time you saw the truck until the accident happened? A. Yes, there was a distance in there.

X-Q. Well, let me ask you the question again I asked you before. At 100 feet back towards Concord from this construction you were traveling about one foot out from the edge of it—the [645] right wheels of your car? A. That's right.

X-Q. What? A. That's right.

X-Q. And that construction, to avoid it as you go into this two-lane space, presented a little bit of a problem to you, didn't it? A. I don't recall that it did.

X-Q. You would want to pass abreast of this construction something more than 12 inches away from it, wouldn't you, going at a speed of 30 miles an hour? A. What was your question again?

X-Q. You would want to pass abreast of this construction something more than 12 inches, one foot away from it as you came along that road at 30 miles an hour, wouldn't you? A. No.

X-Q. Oh, you would, Doctor, wouldn't you? And if you wouldn't, say so.

Mr. Buzzell: Well—

Mr. Daley: Let him answer.

The Court: No, I'm going to permit this.

Mr. Buzzell: I know, but may I say this? I understood the doctor's testimony was that the right wheels were a

foot from the north side of the center lane. He didn't say from the construction.

[646] The Court: I understood him—well, I won't interfere. If there is any misunderstanding, you may ask him again, Mr. Daley.

X-Q. Let's see if we can take care of the objection and the suggestion that your counsel may want you to have. If this [pointing] represents, from this rail to this wall, represents 10 feet of the road, the north lane of the three lanes—do you understand me now? A. Yes.

X-Q. If that distance represents the north lane of the road, you have told this jury that the whole of that distance was blocked to your travel by what was going on in the way of construction, haven't you? A. Yes, the north lane.

X-Q. The whole of it? A. That's right.

X-Q. So that if your lawyer suggests there may be a difference between the lane in the road and the part open for construction, because of construction, you were traveling about one foot from the south side edge of that construction as you drove towards it, weren't you? A. Yes, I was.

X-Q. Yes; you were. A. I was well within the lane.

X-Q. No; you have answered the question. You were driving [647] one foot; and in that [indicating] is the distance between the edge I am tapping on the floor, so far as this linoleum is concerned, and the jury rail, isn't it? Are you telling the jury that you contemplated driving 30 miles an hour with the right-hand edge of your car that close for the construction as you passed by it? A. That's right.

X-Q. You were turning left away from this construction to give yourself more room, weren't you? A. No, sir.

X-Q. No? Who have you talked with about the evidence

that you gave on December 2nd since you took the stand today? A. Who have I talked with?

X-Q. Yes. A. Only with counsel, sir.

X-Q. Do you remember, Dr. Howart, that when you were first brought to the witness stand you told this jury that the right-hand side of the truck—I'm emphasizing the right-hand side of the truck—collided with the left front of your vehicle? A. I did. I think I erred in that statement.

X-Q. Who brought to your attention the proposition that you might have erred in that statement? A. I realized it at the time, immediately afterwards.

X-Q. Doctor, how long have you been driving? A. Oh, since I was fourteen years old.

[648]. X-Q. There wasn't any question when my four o'clock friend was asking you those questions the other day that you told him voluntarily the first instance when he asked you how the accident happened what part of the car was in contact with the right-hand side of the truck? A. That's what I said.

X-Q. There's no question you said it. And then you told him, when he asked you the question, you mean the side opposite the driver? A. I didn't hear that.

X-Q. You didn't hear that? A. No.

X-Q. If I assure you that my memory is he asked you just that question, you answered it Yes, it was the side opposite the driver, didn't you? A. I didn't hear that question, sir.

X-Q. You know very well it wasn't the right-hand side of the truck that was in contact with you, don't you? A. No, it was the left-hand side of the truck.

X-Q. But I say you know very well it wasn't the right-hand side of the truck? A. Yes.

X-Q. And it is your statement to this jury that when you were here on December 2nd and told them it was the

right-hand side of the track, that you knew then it was not so? [649] A. Yes, I did know then it wasn't so.

X-Q. And yet you told them that? A. That's right.

X-Q. It wasn't until after some witnesses came in and gave evidence that you heard that you changed your mind about which side of the truck was involved at the time? A. No, sir.

X-Q. How soon after you left the witness stand did you realize that what you had told them was something that you knew wasn't so? A. Before I left, sir.

X-Q. You realized before you left the witness stand that you had told these ladies and gentlemen something about the point of contact that wasn't so? A. I realized I had made an error in my statement.

X-Q. Standing on the witness stand you realized that? A. Yes, sir.

X-Q. You had no hesitation within a matter of some minutes in telling me you had made a mistake about some evidence and by correcting yourself, did you? A. No.

X-Q. You would have no hesitation doing the same thing on December 2nd either, would you, if that had been the situation? A. I did hesitate in doing it; but it was an error, sir.

X-Q. It wasn't so, perhaps, but it was an error as to your [650] recollection of the event? A. Yes, it was an error.

X-Q. Well, now, you told your lawyer this morning before we went to lunch that you had slowed your car from 30 miles an hour and had practically stopped so you were driving then at a speed of 5 miles an hour? A. That's right.

X-Q. Were you in error about that in any way? A. I don't think so.

X-Q. Does your memory about these things, the points of contact and your position in the road and the speed of

your automobile, vary depending on when a given question is asked of you? A. No, sir.

X-Q. You distinguish very clearly between a speed of 5 miles an hour and a speed of 30 miles an hour, don't you? A. Yes.

X-Q. There is no room for doubt in the statement by you that your speed was 5 miles an hour if in fact it was 20 miles an hour, is there? A. No, sir.

X-Q. Then there would be no reason whatever, if it was the fact, for you to have stated 20 miles an hour to be your speed at the moment of contact by reason of any confusion in your mind, would there? A. I didn't get your question, sir.

[651] X-Q. I don't blame you.

Mr. Daley: Strike it out. May I have the interrogatories, please? [Handed.]

X-Q. I am going to read you a list of questions which are sometimes called interrogatories, and they are interrogatories in the suit brought by Mr. O'Brien against you in which you are the defendant. A. Yes, sir.

X-Q. And these are questions propounded by the plaintiff—that's O'Brien—to be answered by the defendant—that's you—under oath, and I show you here a paper, and this bears your signature on it, doesn't it? A. Yes.

X-Q. And it bears the signature of a Notary Public in Washington, D. C., before whom you took oath as to the truth of your answers? A. That's right.

X-Q. And that gentleman I can't read his signature but you undoubtedly know his name. A. Neil H. Wheeler.

X-Q. And the date on which you swore to the truth of the answers before Mr. Wheeler was concerned, 1954? A. Yes.

X-Q. Question 18:

"Please state the rate at which the defendant's vehicle was moving at the moment [652] of contact."

And the answer that you gave to that was what? Read it aloud. A. It says, "About 20 miles per hour."

X-Q. How do you account for that estimate under oath of 20 miles an hour and your sworn testimony today of 5 miles an hour in view, sir, of your evidence to this jury a few moments ago that there was no confusion in your mind between those two estimates? A. Well, I merely applied the brakes to the car and slowed down.

X-Q. Oh, no, this is your speed at the moment of contact, isn't it? A. That was my estimate.

X-Q. Your estimate was 25 miles an hour in September, and you slowed yourself down to 5 miles an hour today; is that so? A. There are two different statements.

X-Q. They can't be reconciled, can they? A. They are different.

X-Q. They can't be reconciled, can they? A. Yes, I think they can be.

X-Q. You just said within minutes that a speed of 20 miles an hour was something that you wouldn't confuse with a speed of 5 miles an hour, haven't you? A. Ordinarily that's true.

X-Q. This statement, the one written on the paper of 20 miles [653] an hour was something that you had an opportunity to think over before you swore it to be true, wasn't it? A. That's right.

X-Q. And in connection with which you had the advice of your own lawyer; right? A. Right.

X-Q. And there was no misunderstanding or no confusion in your mind when you said 20 miles an hour, was there? A. No, it was an honest estimate at the time.

X-Q. The speed doesn't change when it is inquired of at a particular moment from day to day or from year to year, does it, in your memory? A. No, sir.

X-Q. Now do you account for 5 miles an hour? How do you account for 5 miles an hour today in the light of

that? A. I think it's probably some fact that I didn't know.

X-Q. You don't know now what your speed was, to be truthful about it, do you? A. At the time of the contract I know I slowed down and applied the brakes.

X-Q. You don't know now where you were in the road when the accident happened, do you? A. I was in the center lane.

X-Q. That your going to stay by? A. Yes, sir.

[654] X-Q. And you are going to swear you never turned to the left, too, aren't you? A. Yes, sir.

X-Q. Because if you had you would have no case, would you?

Mr. Brazell: Objection.

Mr. Daley: I withdraw it.

Mr. Prendergast: No, I want it in.

X-Q. Well, let's take your story of this event. You told your lawyer this morning—and there has been no change in this respect this afternoon in your testimony, has there? A. No, sir.

X-Q. Too quick a time? You told your lawyer this morning there were about five carlengths, four or five carlengths, when the truck came over from its right-hand lane for the first time? A. That's right.

X-Q. And would you agree with me that a carlength is something about 15 feet? A. Yes.

X-Q. So that we're talking about the distance between your car and the truck of something of about 60 to 75 feet, aren't we? Four or five times 15? A. That's right.

X-Q. So that until you were approximately 60 to 75 feet from this truck, you're telling this jury the truck was in its right-hand lane of the road, aren't you? [655] A. Up until that time.

X-Q. That's the question. A. Yes, sir.

X-Q. And by its right-hand lane I mean the extreme southerly lane of the road? A. That's right.

X-Q. Your speed, you have told the jury, until that moment was 30 miles an hour? A. That's right.

X-Q. And you say the truck was going 40 miles an hour, didn't you? A. It seemed that way.

X-Q. That's your best estimate of it? A. That's right.

X-Q. Now, you have heard while you have been sitting in this court room the proposition that automobiles travel one and one-half times in feet per second as their speed in miles per hour, haven't you? A. That's right.

X-Q. And, using the illustration that was made here the other day, at 30 miles an hour you're traveling 45 feet a second? A. Yes.

X-Q. And at 40 miles an hour the truck is traveling 60 feet a second; is that right? A. I will accept that.

[656] X-Q. Well, that is obvious, isn't it? A. I think so.

X-Q. Now, at 45 feet per second that you're traveling and at 60 feet per second for the truck coming towards you, the vehicles are narrowing and covering this distance at a total rate of 105 feet per second, aren't they? A. Yes.

X-Q. What? A. Yes.

X-Q. Now, these are your figures, these are your estimates, aren't they—speeds? A. Yes, sir.

X-Q. And distances, and positions on the road? A. That's right.

X-Q. At 4 to 5 carlengths, which is 60 to 75 feet of space on the road, your car and the truck covered that 60 to 75-foot distance at the combined rate of 105 feet per second; that's right, isn't it? And these are your figures, aren't they? A. 105 feet per second.

X-Q. All right. If your statement of speeds of automobiles is correct and if your distances are correct in any way, this truck was on its own right-hand side of the road literally less than a second before the accident happened—and that's so, isn't it? On its own right-hand side of the

road, the truck in its own right-hand lane; that is so, isn't it? [657] A. I don't know, sir.

X-Q. Well, let's go over it again. It's on its right-hand side of the road until it is four or five carlengths away from you—that you say? A. Yes.

X-Q. And that you saw? A. Yes.

X-Q. And you then are traveling 30 miles an hour? A. Yes.

X-Q. You are traveling over the intervening space, 60 to 75 feet, at 40 feet per second, and the truck from the other end of this 60 to 75 feet space is traveling at the rate of 60 feet per second? A. Yes.

X-Q. So that when an accident happened within this 60 to 75 feet of space it happened in less than a second from the time that you say the truck was on its own extreme right-hand lane of the road? A. I think that's about right.

X-Q. So that when you're telling the jury that this truck turned to your side of the road you are attempting to describe something that happened less than one second before the contact, aren't you? A. Yes.

X-Q. And you're trying to tell the jury you made an observation [658] of that? A. That's right.

X-Q. Within that fraction of an instant of time? A. That's right.

X-Q. And with it you are trying to tell the jury from that instant when you saw the truck 60 to 75 feet away from you in a fraction of a second you had slowed your automobile either to 20 or 5 miles an hour, and I don't care which it is; that's your evidence, is it? A. Yes, that's what I said.

X-Q. Let's talk about what happened. Leave it just that way. When it is recorded in a hospital record that a patient is asymptomatic, what does that mean to a doctor? A. It means he doesn't have any symptoms.

X-Q. What are symptoms? A. Patient's complaints.

X-Q. It means that the patient has no complaints, doesn't it? A. That's right.

X-Q. And if you write it while a patient is under your care, if you write the patient is asymptomatic, that means that so far as his complaints of his injury are concerned he has none, doesn't it? A. That's right.

X-Q. He says he's O. K.? A. That's right.

[659] X-Q. Is the hospital record of July 2nd, 1952, less than two weeks after the accident, which describes you as being "asymptomatic now,"—is that your recollection of what your condition was on July 2nd? A. That's what the hospital record says.

X-Q. My question to you now, sir, is that, putting your mind back, the fact is that on July 2nd you have no complaints? A. I had symptoms, sir.

X-Q. Doctor, I have adopted your definition of the word medically "asymptomatic", haven't I? A. That's right.

X-Q. You said that to a doctor "asymptomatic" means without complaints, didn't you? A. Yes.

X-Q. Were you without complaints on the date of July 2nd, as this Massachusetts General Hospital record records? A. Not entirely.

X-Q. Would you say that that was a fair medical characterization of your condition on that date? A. Yes, sir.

X-Q. You heard the hospital record describe, use the word "minimal" in reference to your injuries, didn't you? A. Yes, sir.

X-Q. Is that medically an accurate description of what they were? [660] A. I don't recall the terms, what they had reference when they use the word "minimal."

X-Q. Well, you had your vacation a month earlier than you intended to; that's about what happened in the summer of 1952, wasn't it? A. No, sir.

Mr. Buzzell: We are getting back into that matter of lost earnings, and I object to it.

The Court: I beg pardon?

Mr. Buzzell: I object because this is with reference to lost earnings, and it's lost earning capacity.

Mr. Daley: Well, you are charged with taking care of it on the redirect examination. I object to it now.

Mr. Buzzell: I am objecting to the question.

The Court: Well, the amount that a person earns is admissible for the purpose of showing whether or not there was a diminution of earning capacity. It is one of the yardsticks. Is there any objection to that statement?

Mr. Buzzell: I am not objecting to the statement: I'm objecting to the question.

The Court: Well, what is the question? I probably misunderstood you.

[Last question read.]

The Court: I will allow that question.

Mr. Buzzell: My exception.

[661] The Court: Oh, certainly.

Mr. Daley: Will you read the question, Mr. Martin, again, please?

[Last question again read.]

X-Q. That is what happened? A. No, sir.

The Court: The answer is No, he didn't.

Mr. Daley: So he said.

X-Q. In the hospital record, under the date of June 24, there is a note that on June 25 you could be ambulatory with assistance. Do you remember hearing that read? A. Yes.

X-Q. Ambulatory, if I am correct, means that you could be up and out of bed if you had somebody to help you? A. Yes.

The Court: Walking around—doesn't it mean that?

X-Q. Walking around? A. Yes, sir.

X-Q. Two days after this what they designated as an

operation in the hospital records you were permitted to be up out of bed, weren't you? A. Yes, sir.

X-Q. Three days. Let me correct that. A. I don't recall the exact number but it is in the hospital record.

[662] X-Q. And, on July 29, the hospital record says "ambulatory as desired."

The Court: July 29?

Mr. Daley: June 29. I beg your pardon.

X-Q. Do you remember having heard that read? A. No, but I think that is true.

X-Q. So that one week after the accident you could be up and out of bed as you wanted to? A. That's right.

X-Q. And you were never confined to bed after that, were you? A. No, sir.

X-Q. And such symptoms as you had, whatever they were, improved with the passage of time? A. That's right.

X-Q. Consistently? A. That's right.

X-Q. And constantly? A. That's right.

X-Q. So that from the time you left the hospital these symptoms that were bothering you, whatever they were, had become less and less with the passage of time? A. That's right.

X-Q. What? A. That's right.

X-Q. When you left the hospital on the 2nd or 3d day of July you had an appointment to come back there on your return to [663] Boston, the hospital says? A. That's right.

X-Q. The record says that. So that by your plans you had arranged to come back to Boston on the 28th or 29th of July? A. That's right.

X-Q. And that was a prearranged time for your return there on your way back to Boston as early as July 2nd or 3d, wasn't it? A. That's right.

X-Q. And when you came back you saw Dr. Myles? A. That's right.

X-Q. Dr. Waddell? A. That's right.

X-Q. And you then drove on to Washington? A. That's right.

X-Q And I take it you were leisurely about your return back to Washington from Boston? A. Yes.

X-Q. Took a couple of days perhaps to finish the trip back home? A. Yes, back on the same day, the next day.

X-Q. And you started your practice immediately after you returned to Washington? A. That's right.

X-Q. Do you have any records that show the appointments you had and the appointments you didn't have through the months [664] of August and September and October, as compared with the— A. I don't have anything here, sir.

X-Q. Do you have them? A. I don't have any records here.

X-Q. My question is have you them somewhere else? A. I have my appointments at home.

X-Q. But you didn't bring them here for the purpose of testifying? A. No, sir.

Mr. Daley: I have no other questions.

Mr. Prendergast: Doctor, are you going to be here tomorrow morning?

The Witness: I hadn't planned to but I can.

Mr. Prendergast: You hadn't planned to?

The Witness: I would like not to be.

Mr. Prendergast: In view of that I am going to ask just one question.

The Court: No, you can ask whatever questions you care to. I am not limiting any cross-examination.

Mr. Prendergast: I won't waste much time.

Cross-Examination by Mr. Prendergast

X-Q. The other day, last Friday, I asked you—

Mr. Prendergast: I withdrew that.

X-Q. Do you know what these gentlemen here do [indicating official reporter]? [665] A. Yes.

X-Q. And they write down everything you say? A. Yes.

X-Q. Do you remember saying this? I'll give you the story, the testimony. [Reading]:

"I was 50 to 100 yards away from the scene when I first saw the truck."

Do you remember saying that? A. I remember using the term 50 or 100 yards but I thought that was the distance the truck was away from me.

X-Q. No, please, because you are not going to be here tomorrow and I want to try to let you get away, otherwise I would have a transcript of the testimony which I will have tomorrow,—in which I say this is what you said, and I am asking you if you said it.

The Court: Now, if it becomes necessary to have any witness, Mr. Mahony, to have any witness you have here, or you desire to have any other witness here tomorrow, I want to say in the trial of this case I'll accord you that privilege and if it becomes necessary the doctor will have to stay here until tomorrow.

Mr. Prendergast: I don't want to inconvenience him.

X-Q. [Reading]:

"I was 50 to 100 yards away from the scene when I first saw the truck."

[666] You say you did not make that statement last Friday? A. I said that I saw the—

X-Q. No, the question is do you say you did not make that statement last Friday? Now, you can say you didn't make it or you did. Which is it? A. No, sir.

X-Q. What? A. No, sir.

X-Q. You say you did not say it? A. No.

X-Q. Well, if the record shows that you did say it you say the record is wrong? A. No, I wouldn't say the record is wrong.

Mr. Mahony: I thought he said he saw the truck 50 to 100 yards away from him.

Mr. Prendergast: No, just a moment, this is something else. Don't start anticipating what I'm getting at, will you?

X-Q. Isn't that what you said about the scene?

Mr. Mahony: Are you quoting from the record?

Mr. Prendergast: I am quoting from the record now and I will have it tomorrow.

Mr. Mahony: All right.

X-Q. You say you didn't say that? A. No, sir.

X-Q. All right. Now see if you said what Mr. Mahony just said. [667] [Reading]:

"The truck was 50 to 100 yards ahead—"

Mr. Mahony: That's right.

"—when I first saw it on my left."

X-Q. Did you say that? A. The track was 50 or 100 yards—

X-Q. Ahead when you first saw it; is that right? A. Yes.

X-Q. Well, now, if you did say that the truck was 50 to 100 yards ahead of you when you first saw it, and that at that time you were 50 to 100 yards from the scene of the accident, then the truck was passing this location right here where the construction was on you were 50 to 100 yards up the street, weren't you?

Mr. Mahony: Objection. That is purely conjectural.

The Court: No, I'll permit the answer. It's cross-examination.

X-Q. Weren't you? A. I'm afraid I don't understand the question.

X-Q. You don't? A. No, I don't.

X-Q. I'm sorry. A. It is quite obviously not true.

The Court: No, no, please.

X-Q. It's quite obviously, is it?

The Court: No, no.

[668] X-Q. If you said—

The Court: The remark made may be disregarded, whatever it was.

X-Q. If you said the other day, "I", meaning yourself, "was 50 to 100 yards away from the scene when I first saw the truck"—you heard what I just said now? A. Yes.

X-Q. And you further said, the truck was 50 to 100 yards ahead when I first saw it on my left," then at the time that you first saw the truck it was going past the construction and you were 50 to 100 yards east of the construction, weren't you? A. No, sir.

X-Q. No. Now, so there will be no misunderstanding, if you use the word "scene"—"I was 50 to 100 yards from the scene"—what did you mean by the word "scene": the place where the accident happened— A. Where the accident happened.

X-Q. The place where the accident happened or the construction?

The Court: He said where the accident happened.

X-Q. Where the accident happened; is that right? A. Yes.

Mr. Prendergast: That is all.

Mr. Buzzell: That is all, Doctor.

[669] MRS. IRMA BELK HOBART, SWORN.

Direct Examination by Mr. Buzzell.

Q. Your full name, please? A. Irma Belk Hobart.

Q. You live where, Dr. Hobart? A. 5110 Manning Place, Northwest, Washington, D.C.

Q. And you are Doctor Hobart, as I understand? A. Yes, I am a doctor.

Q. And the wife of Dr. Hobart who has just testified? A. Yes.

Q. Now, in June of 1952, just before this accident hap-

pened, had you come to Boston to join your husband? A. Yes, I had come on Thursday.

Q. On Thursday? A. On Thursday. The accident happened Saturday.

Q. That would be two days before the accident? A. Yes.

Q. And you had driven your own car up from Washington? A. Yes, sir, I had.

Q. And that was this Chrysler car which was involved in the accident? A. Yes.

Q. Now, on the day of the accident—not to waste time—is your recollection the same as the doctor has testified to as to your activities during the morning, your lunch and so on, [670] starting out to Concord? A. Yes.

Q. And, according to your recollection, what kind of a day was it? A. It was a bright, sunny, warm day.

Q. How warm, would you think? A. I don't remember the temperature but it was too warm to wear a coat, and uncomfortably warm without a coat.

Mr. Prendergast: Too warm to wear one and uncomfortably without one?

The Court: Without one. It was between 80 and 90?

The Witness: Yes, I think so.

The Court: I mean between 90 and 100, wasn't it?

The Witness: Yes.

Q. As you drove out through Concord Dr. Hobart was driving? A. Yes, he was.

Q. And you were riding right beside him on the front seat? A. Yes.

Q. What is your recollection as to the speed at which you were driving as you reached the Concord rotary? A. I believe he was driving between 25 and 30 miles an hour.

Q. And at any point along that road do you remember noticing any construction at any point in the road? A. I remember there was construction but I couldn't tell at what point it started.

[671] Q. Where was it in the highway with reference to the direction in which you were traveling? A. It was in the northerly lane, our right-hand lane.

Q. And in what lane were you traveling after you noticed this construction and came up to it? A. In the center lane.

Q. Can you give us any idea at all how long you had been traveling in the center lane before you reached the point of the accident? A. No, sir, I can't tell you how long. It seems to me it was quite a while.

Q. And at any point prior to the accident had you noticed this truck which was coming from the opposite direction? A. I have been trying to think back and I think I did see it away down the road but I couldn't tell you how far, but it was so far distant that I couldn't identify it as this particular truck.

Q. Now, from that time do you recall whether you noticed it again before the actual impact? A. Yes, I did notice it again.

Q. How far away was it from you when you next noticed it? A. Probably about 75 to 100 feet.

Q. And where was it in the road when it was 75 to 100 feet and you next noticed it? A. It was ahead of us, a little to the left, part of it in [672] the southerly lane and part of it in the middle lane.

Q. That is, when you first noticed it, when it was anywhere near you, it was already partly in your lane, the center lane? A. Yes.

Q. Can you give us any idea at that point how far over in the center lane it was? A. I can't as to number of feet, but it seemed to me—

Mr. Prendergast: No, no, please.

A. About a third of the front of the truck was over in the middle lane.

Q. And that, you say, was at a place where the two

vehicles, your car and the truck, were perhaps 75 to 100 feet apart? A. Yes.

Q. Now will you describe for the jury the subsequent course of travel, as you observed it, and what happened from that point on? A. The truck continued in an easterly direction, with its wheels still over the white line, and continued to come more in the center lane than it had been when I first saw it.

Q. Now, so far as when you first saw the truck, that is, 75 to 100 feet away, what was the position of your car in the road with reference to these various lines? A. Our car was headed directly west, parallel with the white lines in the road.

Q. And in which lane was it? [673] A. In the center lane.

Q. Having in mind now your right-hand or, to put it in points of the compass, the northerly side line of the center lane, could you tell us your best recollection as to how near the right-hand wheels of your car were to that right-hand or northerly side line of the center lane, still at the point where you noticed the truck about 75 to 100 feet away? A. Well, it seemed to me that we were—

Mr. Prendergast: I object to this seeming, your Honor.

The Court: You see, what you have to state is your memory, as you remember it.

Mr. Prendergast: If she has one.

The Court: Yes, that's right.

A. Well, I couldn't see our wheels but the car was well within the white line on the northerly side.

Mr. Prendergast: May that be struck?

The Court: Let me have it.

[Last answer read.]

Mr. Prendergast: "Well within the white line on the northerly side"?

The Witness: Well to the left, I should have said.

Q. Could you give us any estimate as to the distance at all as between the side of your car, that is, the right-hand side as you were proceeding and the northerly side line of that [674] center lane,—I mean, by that, the side line of the center lane which was on your right as you were traveling.

A. My best estimate would be it was within about a foot of the right-hand, the northerly line, from the northerly line.

Q. From that point and up to the time of the collision between your car and the truck, what was the course of your car with reference to the lanes in the street?

The Court: You mean after it was struck?

Mr. Buzzell: No, from the point 75 to 100 feet.

A. It continued in the same direction. It didn't deviate.

Q. So far as you recall now was there any turn to the left on the part of your car in that interval from the time you saw the truck 75 to 100 feet away until the point of impact? A. No.

Q. Now, when the collision occurred do you recall what portion of the truck was in contact with what portion of your car? A. As the truck was facing us, it was the portion of the truck on our right, but from the point of view of the truck it would be the left half of the front of the truck in contact with the left front of our car.

Q. And when that contact occurred, what happened to your car? A. Our car was stopped and pushed backwards.

Q. And have you any estimate or, rather, have you any recollection, can you give us your best recollection as to the speed of your car just prior to the moment of impact when [675] you were struck by the truck as you have testified? A. About 15 miles an hour, 15 or 20 miles an hour.

Q. And you have testified that the impact with the truck stopped your car and then pushed it backward? A. Yes, our car was already slowing up.

Q. But you testified the impact with the truck brought it to a stop and then pushed it backwards? A. That's right.

Q. And pushed it in what direction? A. Well, it must have been pushed in—

Mr. Prendergast: No, no, no conclusions.

Q. Whatever you recall? A. I don't recall.

Q. Do you remember where your car, in what position it came to rest with reference to the side of the road? A. Yes, I saw where it was when I got out.

Q. Let me ask you, did you lose consciousness at any time before this? A. I believe I did.

Q. Have you any idea for how long? A. It was a couple of minutes, probably.

Q. When you regained consciousness do you remember where your car was? A. It was with its rear up against the fence, almost straight across the road. A north and south direction.

[676] Q. Is that a fair representation in—

The Court: The one down below. You mean the enlarged one, Mr. Buzzell?

Mr. Buzzell: Yes.

Q. Can you see this all right, Dr. Hobart, from where you are? A. Yes. I didn't go around to the front of the car after the accident, so I didn't see all that damage.

Q. Is Plaintiff's Exhibit 5 a fair representation of the position of your car? A. Yes.

Q. Is it a fair representation of the position of the truck? A. Yes, it is.

Q. Relative to the position of your car? A. Yes.

The Court: Hasn't she testified how fast the truck was going just before the collision?

Mr. Buzzell: I will ask her.

The Court: Thank you.

Q. Can you give us your best recollection as to the speed at which you observed the truck was traveling just

prior to the moment of the impact? A. About 40 to 50 miles an hour.

Q. Now, after you regained consciousness and your car had come to rest with its back against the fence on the north side of the highway, do you recall seeing the driver of the [677] truck? A. Yes.

Q. Where was he when you saw him? A. He was sitting in his cab behind the wheel.

Q. And at some point did you get out of your car? A. Yes, I did.

Q. And did Dr. Hobart get out? A. After I did.

Q. What happened then? A. There was some people around. Afterwards I found that one of them was a policeman, and we were escorted over to a car and taken to the Emerson Hospital.

Q. Did you observe anything with regard to your husband's condition with respect to injuries immediately following the accident? A. I observed how he looked.

Q. Will you tell the Court and jury how he looked? A. He looked to be in great distress.

Mr. Daley: I pray your Honor's judgment and ask it be stricken.

The Court: Yes, that may be stricken.

Q. Please describe what actually, if anything, you noticed about his physical appearance.

The Court: I tell you what I think I'll do, Mr. Buzzell. I'll stop here because it's very important the [678] court should stop at four o'clock.

[To witness] May I ask you this question. Is that the position of the truck as you saw it?

The Witness: When we left to go to the hospital, it was.

The Court: It was in that position?

The Witness: Yes.

The Court: [To jury] I'll see you tomorrow morning.

God willing, at ten o'clock, and I'm going to give you the same admonition I gave you yesterday.

[Adjourned, at 4 p.m., to 10 a.m., Friday, December 9, 1955.]

[679] EIGHTH DAY

Court Room No. 5,
Federal Building, Boston,
December 9, 1955.

The Court: Will counsel come up?

[Conference at the bench.]

MRS. IRMA BELK HOBART, Resumed

Redirect Examination by Mr. Buzzell, Continued

Q. When court adjourned yesterday, Mrs. Hobart, I was asking you what you observed about the doctor's condition when you rode in the ambulance with him to Boston. Would you tell us about that?

Mr. Daley: In the interests of saving time, would it help if I agreed she would corroborate the story as to what was wrong with him?

Mr. Buzzell: And as to the length of time he was laid up?

Mr. Daley: I don't know whether that is entirely within her province to say.

Mr. Buzzell: Whatever she observed about it. I understand she would confirm his statement as to when he went back.

Mr. Daley: Get the thing and I will agree, without wasting time.

Mr. Buzzell: That is all I have.

The Court: I will permit you to state that to the jury so the jury will know.

[680] Mr. Buzzell: Dr. Hobart's testimony, as I recall,

was that he did not go back to work at all until the first of August and then he went back half time, and went back full time around the first of November.

That's all I have.

The Court: That covers it, doesn't it? Don't you cut yourself off in your direct examination of this lady. You go ahead and do what you feel you ought to do.

Mr. Buzzell: That's all I had for her now.

The Court: I don't want counsel to take any short cuts.

Cross-examination by Mr. Prendergast

X-Q. Doctor, do you specialize in anything? A. Yes, I do.

X-Q. What is that? A. Psychiatry.

X-Q. Psychiatry is what? A. Diseases of the mentally ill.

Mr. Prendergast: Oh, Jeez, I better get out of here.

[Laughter]

The Court: There is another difficulty there. It is the study of the soul. That is the real definition of psychology. Study of the soul, and the soul is the first principle of life and the root of all vital operations of men, and that is the basis of any school of psychology.

[681] X-Q. Doctor, did the car you were in spin around at any time after the accident happened? A. Not that I remember.

X-Q. Your memory of the movement of your car after this accident happened was that it either bounced backwards or was pushed backwards? A. I don't remember that part of it.

X-Q. You say you were unconscious for a couple of minutes, you thought? A. I estimated it at that.

X-Q. And you say you saw the driver of the truck sitting up in the truck? A. Yes.

X-Q. Did you see how he got out of the truck? A. No.

X-Q. Did you see or did you hear the noise created with

the—when the men were trying to pull open that door to get him out? A. No.

X-Q. Did you see or hear any noise indicating to you the handle of the door of the truck was pulled right off in an attempt to open the door? A. No.

Mr. Prendergast: All right. I won't waste any more time.

The Court: I suppose there are various definitions. [682] Sometimes a psychologist goes into the field of psychiatry; isn't that right?

The Witness: They do deal with the mentally ill sometimes, but psychology is the study of the mind and psychiatry is the diseased mind.

The Court: The mind is the soul, whether diseased or undiseased, but sometimes you get into the field of psychiatry?

The Witness: That's right.

Cross-examination by Mr. Daley

X-Q. Doctor, just a very few questions. You saw an automobile that was a considerable distance away from you on the road that you did not identify as the defendant's truck at the time you first saw it? A. That's right.

X-Q. And then you told the jury the next time you saw a truck which you identified as the oil truck was at a time—do I have it correctly, when it was 75 to 100 feet away from you? A. I estimated it at that.

X-Q. That is your best estimate? A. Yes.

X-Q. So that we can visualize that a little bit, it was something no more than twice the length of this room, which the Judge has said is 50 feet? A. I would estimate that.

[683] X-Q. And all the observation you have that you have told us about yesterday was after you saw this truck 75 to 100 feet away from you coming towards you? A. Yes.

X-Q. And during the time that that truck was coming

towards you, your Chrysler automobile was going toward it, wasn't it? A. Yes.

X-Q. In other words, the two automobiles closed that 75 to 100 foot distance traveling in the road in the opposite directions? A. That's right.

X-Q. And all of the observation you have made, to repeat it just once more, was during the interval of time that they traveled towards each other in that distance of 75 to 100 feet? A. The observations I made before the contact. I made some observations afterwards.

X-Q. I am speaking about the ones before. A. Yes.

X-Q. Do you share professional offices with your husband? A. No.

X-Q. You practice at some different address? A. Yes.

Mr. Daley: That's all, Doctor.

Mr. Buzzell: That's all, Mrs. Hobart.

The only other thing I have for the plaintiff, Dr. Hobart's case, and I believe it is agreed to, is that Mr. [684] O'Brien was operating the vehicle within the scope of his employment.

The Court: I understand—

Mr. Daley: There isn't any question.

The Court: I am glad you spoke of that. There is no disagreement over that.

Mr. Daley: Never has been.

The Court: There was some statement made about it at the beginning.

Mr. Prendergast: Yes.

Mr. Buzzell: And that is the plaintiff's case, as far as Dr. Hobart is concerned.

Mr. Prendergast: I have no rebuttal.

Mr. Mahony: I still have some evidence to offer but I understand your Honor wanted to take it in the absence of the jury.

The Court: That's in connection with—

Mr. Prendergast: [Clearing throat]

[Conference at the bench.]

The Court: I am going to ask you to retire but I am going to say this to you now. After this you are going to argue?

Mr. Prendergast: Right away.

The Court: So I am going to make arrangements for you, right away, for you to have—you have been so wonderful [685] and patient and kind—going to arrange for you to have dinner. I have sent Mr. Shannon down for the purpose of getting a menu and some special menus. At one o'clock you will have lunch.

Now I am going to ask you to step out, if you will, for a little while, because there is a question I have to settle here. We won't be too long. I was wondering if I could reserve on that until after the verdict.

Mr. Prendergast: He wants some evidence in the record, that's all.

[Conference at the bench.]

[The jury retire.]

[Further conference at the bench:

Mr. Mahony: I want to offer this evidence both on the main case, as a partial basis for my Motion for Directed Verdict and I also offer it as the basis for my Motion for Summary Judgment. And I am offering now these demands for admission of fact and the answers thereto which are as of record in this particular case.

Mr. Daley: May I interrupt to say this, that I understand your offer is confined solely to the issue—

Mr. Mahony: That is of O'Brien against Hobart.

Mr. Daley: O'Brien against Hobart, and it is not to be part of the record in Hobart against [686] Donovan and O'Brien.

The Court: That's right.

Mr. Buzzell: Let me interject at that point. I think the ultimate ruling on this might have an effect on the case of Hobart against O'Brien.

Mr. Daley: It certainly can't in that evidence is not in the case of Hobart v. O'Brien.

The Court: It couldn't have any effect if the jury knew nothing about it, anyway.

Mr. Buzzell: It isn't on the question of the effect on the jury at all.

The Court: All right, Mr. Mahony; go ahead.

Mr. Mahony: One, that the plaintiff's alleged automobile accident occurred on Saturday, June 21, 1952 on Route 2, Concord, Mass. Answer: Admitted.

Two, that at the time of the alleged accident the plaintiff was employed by the Utility Oil Company, Somerville, Massachusetts. Answer: Admitted.

Four, that at the time of the alleged accident the plaintiff was operating the said vehicle on the business of the said Utility Oil Company. Answer: Admitted.

Five, that at the time of the alleged accident the plaintiff was in the course of his employment by and for the said Utility Oil Company. Answer: Admitted.

[687] Six, that the plaintiff's alleged injuries arose out of and in the course of his employment with the said Utility Oil Company. Answer: Admitted.

Seven, that the plaintiff commenced the present action by Bill of Complaint dated June 26, 1952, returnable at court July 16, 1952. Answer: Admitted.

Nine, that the plaintiff signed an agreement as to compensation dated August 8, 1952. Answer: Admitted.

Mr. Prendergast: Did you skip eight?

Mr. Mahony: I have skipped three and eight.

Ten, that the said agreement as to compensation provided for the payment to the plaintiff by Home

Insurance Indemnity Company of a weekly workman's compensation benefit for and on account of the injuries claimed to be received by the plaintiff in the aforementioned automobile accident of June 21, 1952. Answer: Admitted.

Twelve, that the said agreement provided that the date of the first payment thereunder should be August 11, 1952, the same to be in the amount of $210. Answer: Admitted.

Thirteen, that the plaintiff thereafter received and accepted the weekly benefits provided by the aforesaid agreement. Answer: Admitted.

[688] Fourteen, that the plaintiff signed an agreement for lump sum payment dated July 21, 1954. Answer: Admitted.

Sixteen, that the plaintiff received and accepted the sum of $4,850 called for by the said lump sum agreement. Answer: Admitted.

Seventeen, that the plaintiff received from Home Indemnity Insurance Company a total of $8,120 in workman's compensation benefits for and on account of the injuries allegedly sustained as a result of the automobile accident which is the basis of the present action. Answer: Admitted.

Eighteen, that at no time subsequent to June 26, 1952 has the plaintiff discontinued the present action. Answer: Admitted.

Those are the specific demands and the answers thereto filed in this present action in this court.

Mr. Prendergast: Are you through?

Mr. Mahony: Yes.

Mr. Prendergast: Now the plaintiff O'Brien offers No. 8 of the Defendant's Requests for Admission of Facts, that the plaintiff retained Reuben H. Nitkin, 110 State Street, Boston, Mass. to represent him and

authorized the said Nitkin to commence the present action.

[689] Mr. Mahony: And that is objected to.

Mr. Prendergast: No. 11, that the said agreement as to compensation expressly provided that it shall be payable from and including the 23rd day of June, 1952 until terminated. And 15—

Mr. Mahony: Wait a minute. You are offering the answer to that?

Mr. Prendergast: The answer to that is—

Mr. Mahony: You haven't read it.

Mr. Prendergast: "I have no personal knowledge of the fact." Why haven't you got—where is the answer?

Mr. Mahony: The answer is, "I have no personal knowledge of the fact."

Mr. Prendergast: Then I withdraw that. I thought it was answered.

Mr. Mahony: You are just offering No. 8?

Mr. Prendergast: That's all I can get in, I guess. I would offer 15, but the figures are apparently incorrect.

Mr. Mahony: And the offer of No. 8 is objected to.

Mr. Prendergast: I wish now, your Honor, to ask Mr. Mahony if it is necessary for me to put this evidence on under oath in front of you because if it [690] is, I will do it. I have the witnesses here in court and the evidence that I will produce will be this: that Mr. Nitkin—

Mr. Mahony: Evidence from Mr. Nitkin?

Mr. Prendergast: Yes, and he is a member of the bar and is right here, that at the time he conferred with the insurance company which carried the workman's compensation for the employer of Mr. O'Brien, which insurance company was the Home Insurance

Indemnity Company, relative to Mr. O'Brien receiving workman's compensation, a duly authorized agent of said Home Insurance Company stated that he then wanted Mr. Nitkin to understand that they were to be subrogated to the O'Brien case, which was then pending in the Federal Court and that he then wanted Mr. Nitkin to handle the case from then on on behalf of Home Indemnity Insurance Company and as their attorney and that in due course if and when any moneys were received as a result of the case that was then pending in the Federal Court, upon final adjudication the moneys were to be divided in accordance with Chapter 152, Massachusetts General Laws.

Mr. Mahony: Is that the gist of the testimony you are offering?

[691] Mr. Prendergast: That is the testimony as to that.

Mr. Mahony: All right. I would object to the testimony but would not object to the statement that, if called to testify, Mr. Nitkin would testify as suggested by Mr. Prendergast, but I would object to the admissibility and competency of the evidence.

The Court: In other words, Mr. Mahony agrees to the substance of your statement.

Mr. Prendergast: And that that testimony would be here for whatever—

The Court: That's right, but he doesn't admit it is competent.

Mr. Mahony: And if it were offered, I would object to its admissibility.

Mr. Prendergast: That is the only reason he is objecting to it.

Mr. Mahony: If permitted to testify, he would testify as you said.

Mr. Prendergast: And the Judge could draw whatever inferences from that testimony he wished.

Mr. Mahony: I am not sure about the legal inferences.

Mr. Prendergast: Well, that's all right. I also wish to have it appear that a Mr. King, [692] representing the Home Indemnity Insurance Company, now is here.

Mr. Mahony: What office does he hold?

Mr. Prendergast: He is the manager. What is your office?

Mr. King: My title?

Mr. Prendergast: Yes.

Mr. King: I am supervising attorney.

The Court: Let's have your full name, Mr. King.

Mr. King: Arthur T. King.

Mr. Prendergast: Supervising attorney. Are you a member of the bar of Massachusetts?

Mr. King: Yes, sir, Massachusetts and Federal.

Mr. Prendergast: And a member of the bar of Massachusetts.

Mr. King: And Federal.

Mr. Prendergast: And Federal as well. That I would put him on the stand and he would testify as follows: namely, that during the past few years he has been in charge of the file of the Home Indemnity Insurance Company in relation to Mr. O'Brien and that he has recognized and still recognizes Mr. Nitkin as being the attorney for the Home Indemnity Insurance Company in relation to the present claim and he will further testify that on behalf of the Home Indemnity [693] Insurance Company he will stipulate with this Court, either orally or in writing, that no further actions of any kind or nature by way of new suits or new claims or other types of legal proceedings other than whatever may be necessary by way of appealing this

case—he will take no such other actions on behalf of the Home Indemnity Insurance Company against Dr. Hobart or against Mrs. Hobart.

Mr. Mahony: Now, the defendant Hobart would object to the admissibility of such testimony on the basis that it is incompetent, irrelevant, immaterial and inadmissible, but that if permitted to testify Mr. King would testify as suggested by Mr. Prendergast.

The Court: Factually?

Mr. Mahony: That's right.

Mr. Prendergast: I want to have it appear that Mr. King, the gentleman already mentioned in my previous statement, or the attorney already mentioned in my previous statement, will now, in open court, if your Honor desires, make a statement to you as to the fact that no future proceedings other than the one is already pending here now will be brought against either Dr. Hobart or Mrs. Hobart or the Liberty Mutual Insurance Company in relation to the accident which occurred on June 21st, 1952.

[694] Mr. Mahony: And the defendant Hobart would object to any such statement being made.

The Court: But would admit, if he did—

Mr. Mahony: He has not asked for testimony. He says this is a statement in open court. Not testimony. I object to any such statement being made.

Mr. Prendergast: I have a decision that says I can. But just let's get it. Supreme Court of Massachusetts.

The Court: Is it necessary for you?

Mr. Prendergast: It is advisable, yes. If you read this decision—pardon me, your Honor. Let me save you time. 219 Mass. 560, at 565.

The Court: Read it out, will you?

[Mr. Prendergast reads from the cited case.]

[Discussion off the record.]

The Court: I know you object to it, to its admissibility, but whatever is admissible—

Mr. Mahony: This isn't testimony. I would agree, if permitted to make the statement, that Mr. King would make the statement as suggested but it is wholly incompetent and inadmissible.

Mr. Prendergast: Would you read that—you are not questioning the authority of Mr. King to make such a stipulation, in the presence of the Judge? Let's [695] put it that way.

Mr. Mahony: I understand what he would say was that he was the manager and supervising attorney of the Home Indemnity Company.

Mr. Prendergast: With authority to do this.

Mr. Mahony: Well, I claim there is no legal authority he could be given to do it.

The Court: But would you admit he would testify he did have that?

Mr. Prendergast: Authority to guarantee you your company will not suffer, as they say here, would be liable.

Mr. Mahony: From the company.

The Court: From the company.

Mr. Mahony: From the Home Company.

Mr. Prendergast: Yes.

Mr. Mahony: That he would be authorized by the Home Company to make that statement?

Mr. Prendergast: That's right.

Mr. Mahony: All right, but still objecting to it.

Mr. Prendergast: I have a motion here.

Mr. Mahony: Wait a minute, now.

The Court: I want to rule on these matters now.

Mr. Mahony: Wait just a minute.

[696] The Court: All right.

Mr. Mahony: With that—

The Court: Don't misunderstand me, I want to preserve all your rights.

Mr. Mahony: With that the defendant rests and presents again his Motion for Directed Verdict on all three counts included in it so that there is now pending before your Honor, on behalf of the defendant Hobart, the Motion for Directed Verdict and the Motion, which you deferred hearing on, for Summary Judgment.

Mr. Prendergast: Before you answer that, may I suggest I want to make an amendment to the statement already made relating to what Mr. Nitkin would say. Mr. Mahony can, if he wants to, examine him on it. Mr. Nitkin will also testify, when he was engaged as an attorney within a matter of days after the happening of the accident on June 21, 1952, and he found out that the defendant was a doctor from Washington, he didn't know, of course, whether there was any insurance to protect his client or not, he then brought suit in the Federal Court and the documents will show he proceeded to try and get a ne exeat which Judge Wyzanski refused to grant when it appeared that there was insurance in the instance [697] and the Judge denied the ne exeat.

Mr. Mahony: The defendant Hobart's position is the same as that stated previously.

The Court: That's right. You will agree he did say that?

Mr. Mahony: If permitted to testify.

The Court: Is there anything else you want to say?

Mr. Mahony: I have said all I can and everything I would say is included in my brief.

The Court: If—everything you want to say has been said by Mr. Mahony; is that right, Mr. Buzzell?

Mr. Buzzell: I wish to save the rights of the plaintiff Hobart's case.

The Court: What about you?

Mr. Daley: I have left in my office a printed, typewritten Motion for Directed Verdict and I have now written it in longhand and I have given it to your clerk and Mr. Buzzell.

The Court: I want to clear the record so there will be no confusion on all these matters. I will take under consideration the Motion for Summary Judgment. I will reserve that. It is under advisement in the case of O'Brien v. Hobart.

Mr. Mahony: The Motion for Summary Judgment [698] you are reserving?

The Court: That's right. I will reserve decision under the Rules of Civil Procedure, first on the two motions, the Motion for Directed Verdict in the case of O'Brien v. Hobart, that filed by counsel for Hobart and then I will reserve also in the Motion for Directed Verdict filed by Mr. Daley in behalf of—in the case of Hobart v. O'Brien.

Mr. Buzzell: And Donovan.

The Court: I meant to add Donovan. It is understood I include Donovan when I say that, Mr. Mahony.

Mr. Mahony: I understand you are reserving decision on my Motion for Directed Verdict and on my Motion for Summary Judgment.

The Court: Yes. These motions are all separate motions, so I will reserve on all of them.

Mr. Prendergast: Could I have the clerk go back and read as to what I would say in the record, as to what I said Mr. Nitkin's testimony would be? I want to establish the date on which he was engaged by the Home Indemnity Insurance Company.

The Court: When I say I will reserve, I will reserve on the statements of Mr. Prendergast.

Mr. Mahony: As to the admissibility.

The Court: That's right. I will reserve on [699] your objection.

[The Court Reporter reads from line 20, page 688 to line 23, page 690.]

Mr. Prendergast: That the conversation between the Home Indemnity Insurance Company's duly authorized representatives and Mr. Nitkin, wherein Mr. Nitkin was engaged, took place within two weeks of the time of the accident, namely June 21, 1952.

Mr. Mahony: Would he say that or would he say it was in July when they discussed it? Would you say that was after the suit was brought and before you discussed compensation?

Mr. Prendergast: I made a mistake.

Mr. Mahony: Yes: It was in July or August?

Mr. Prendergast: It was within—withdraw "It was within two weeks of the date of the accident."

Mr. Mahony: July or August. "

Mr. Nitkin: Either July or August. We had several conversations.

Mr. Prendergast: When was the first one?

Mr. Nitkin: In July.

Mr. Mahony: I have no objection to that being included in his offer.

The Court: All right.]

The Court: How much time do you want?

[700] Mr. Prendergast: A half an hour.

Mr. Mahony: Half an hour.

[Brief pause.]

Mr. Prendergast: Wait a minute. This motion. [Handing to the Court.]

[Mr. Mahony confers with the clerk.]

[Conference at the bench.]

The Court: Is it all right if we take a sealed verdict in this case?

Mr. Prendergast: It is all right with me. Supposing that we stay enough time so we see they don't want any questions asked.

The Court. We can't ever tell that.

Mr. Prendergast. I hope they are not going to be discharged until Monday morning to answer a question.

[The jury return.]

Mr. Mahony? Do I go first?

Mr. Prendergast: Daley second, and then Mr. Buzzell and I.

The Court: I have to settle certain motions that I reserved until all the evidence is in. I have been here passing upon a number of motions and they have already been settled, and so that you fully understand the situation, all counsel agree, and I think it is a very commendable thing, that the pleadings should not go to the jury. There are a number of [701] interrogatories which you have had read to you. If you fail to recall them, as I told you before, they can be reread, but if a lot of papers are sent into a jury room, they—my memory is that the pleadings were not read, and then there may be something in the interrogatories that might harm either party so in the light of fairness and equity and in the light of the simple principle of good old horse sense, and you can't have that unless you have the rights of all parties preserved, we decided not to do it, and it is no reflection upon you.

All right, Mr. Mahony.

[Mr. Mahony argues to the jury.]

Closing Argument by Mr. Daley

Mr. Daley: May it please the Court, Mr. Foreman and Ladies and Gentlemen, counsel in this case are going to make an effort to argue it to you in as little time as possible, consistent with our obligation to do the best we can for the respective clients we represent and I appear, as

Mr. Mahony has reminded you, as an attorney defending for Mr. O'Brien and for his employer, Mr. Donovan, a suit brought by Dr. Hobart for personal injuries which Dr. Hobart received in this accident.

I had intended, as I heard Mr. Mahony outline a scheme of argument to you in which he discussed damages first and went to liability—I had intended, listening to him, to adopt that scheme and to discuss with you, when it came my turn, first the question of damages, the comparatively minimal [702] damages that even Dr. Hobart, on his best evidence, has when you listen to the overwhelming injury that Mr. O'Brien had suffered, but as I listened to my brother argue the question of liability, it occurs to me that so much has been said by him calculated to influence your verdict that can be rebutted effectively, I am sure, that with your indulgence I shall discuss first the question of liability, prefacing that, perhaps, by saying that with one statement I am in agreement with Mr. Mahony, namely that there are four possibilities in this case, one of finding a pure accident; two, finding both drivers here to blame; three, find O'Brien was solely to blame; four, finding Hobart was solely to blame. And just as Mr. Mahony said to you, there can only be a verdict for Hobart in the case that I am defending if you find that O'Brien was solely responsible and, Mr. Foreman and Ladies and Gentlemen of the Jury, you are never going to find that when you give consideration to the evidence you have heard.

Mr. Mahony has said to you there is an abundance of witnesses, overwhelming in number, favorable to his client and adverse to O'Brien. And he lists among them the police officers and Mr. Robinson. They are no more favorable to him than they are to O'Brien. And I suggest that it is not accurate for him to claim that they favor his side of the case by their evidence, any of it, any of them.

There are witnesses from whom you are going to learn—

[703] from whom you have learned about the happening of this accident who are four in number—six in number. There were the two Hobarts, the two Whitneys, Mullaney and O'Brien; that is six.

O'Brien was the first man who came to the witness stand. He is a gentleman who makes no apology for the fact that he doesn't have a formal education, as does Dr. Hobart—husband and wife, Doctors Hobart. And he comes to the witness stand and tells you this, in essence: that he is homeward bound, in no particular hurry, around 1:30 o'clock, on a road with which he is familiar, not, if you please, a road over which he is traveling for the first time. And he says to you, in essence, this, doesn't he? That as best he can remember he is in his righthand lane and that there is a truck traveling ahead of him with a box that is loose in that truck, bouncing around, and that he is focusing his attention particularly on that truck and the box, there being no problems about automobiles coming towards him, and that traveling in that position, having seen a vehicle—two vehicles from some distance away, he pays no further attention to them until, out of the corner of his eye, he sees one coming over towards him, and then a collision with the left front wheel of his truck which causes the truck to go out of control and him to be knocked from the wheel, with the automobiles admittedly winding up where the police photographer's pictures show them to be.

[704] Dr. Hobart is represented by able counsel; you appreciate that fully—not one, but two able counsel. In all the evidence that has come from the Whitneys, these wonderful, disinterested people, and from the Hobarts, is there any denial that there was such a truck traveling ahead of O'Brien? Wouldn't it have been that evidence if the Whitneys or the Hobarts could conscientiously come here and deny that there was such a truck?

There was a suggestion early in this case that the box

bouncing around was, perhaps, a recent invention by O'Brien, but when a statement is called for, taken some very few days after this accident happened, you find in it, by O'Brien, the story of the bouncing box. Now, who says effectively to you that the story isn't so? Let's separate the wheat from the chaff. The police officers don't have anything to do with that statement or that contention. Neither does Robinson. The people it deals with are the Whitneys and the two Hobarts.

Dr. Hobart was the first of those who appeared on the witness stand and, borrowing something from what my brother said to you in his argument, you judge not only what is said to you when you come to find out the credibility of the witness, the accuracy, yes, and even more the willingness to tell the truth of a given witness—you judge, I say, not only what he says but the way he says it. And Dr. Hobart [705] specifically and definitely told you a story when he first was here that you could not believe. And I refer to his statement then that it was the right side of the truck that turned and hit the left side of his automobile.

Now, Dr. Hobart is a man of intelligence, a man of composure on the witness stand, very obviously that. A man who either has a definite memory with which he can come and give you what took place or who doesn't know at all how this accident happened except that there was a collision of two vehicles. When he came back to this witness stand yesterday, six days after his first testimony here as a witness, he recanted that story very glibly and gracefully before the morning recess, just told you in a casual manner it was the left front of the truck that was in contact with his vehicle, and there it stopped. And I asked him questions about it in the afternoon and I got some answers and he left it that while he was on the witness stand the first day he realized he made a mistake but did nothing about it. He gave you the impression the matter perhaps hadn't been

gone into with sufficient thoroughness for him to appreciate what he was saying.

Let's see about that, because today we have a typewritten record of what he said back on December 2, the first day he testified. Page 43 of that record.

The Court: Is that a stenographic transcript of what was taken?

[706] Mr. Daley: That's right.

The Court: No dispute over that, is there, Mr. Mahony?

Mr. Buzzell: No.

The Court: That's right.

Mr. Daley: For my brother's benefit, I am referring to page 43 of the record; line 10. Question to Dr. Hobart:

"Q. What part of the truck did your car come in contact with? A. The truck's right bumper hit my right front bumper and wheel, my left front bumper and wheel.

"Q. The truck's what? A. The truck's right.

Q. Right front bumper? A. That is right.

Q. Hit what? A. Hit my front bumper and wheel."

And turning from that, Mr. Buzzell, so that you can answer it when you argue, to line 23, page 46:

"Q. Just one question, Doctor, you said it was the right side of the truck which was in contact with the left side of your car, didn't you? A. Yes.

Q. You don't want to change that now, do you? A. No, sir.

Q. That is your testimony, you want to leave your [707] testimony as being that in so far as it relates to the parts of the vehicles that came together? A. The left front.

Q. Of your car? A. The left front.

Q. Of your car? A. Of my car, came in contact with the right front of his car.

Q. Now, so there will be no question at all, will you

tell us what you call the right front of the truck? A. The front of the right wheel.

Q. All right. A. Over the right end of the bumper, it is the right side of the car.

Q. You mean it is the side away from the driver? A. That is right.

Mr. Prendergast: You want that; that is definite." And Mr. Mahony then said, "We will postpone our examination of Dr. Hobart." And well they might postpone their examination of him. Because that testimony needed to be straightened out, didn't it? That testimony showed a witness who told you an incredible story of the happening of this accident, and he has told you other things by reason of which I suggest that his testimony is wholly unreliable as an accurate recital of what took place out there that afternoon, and I refer to the [708] contradiction he gave you himself and he can't complain that this came from any witness not favorable to him, about the speed of his automobile and at what speed he had slowed it down to, because from the witness stand he told you he was 30 miles an hour, and to his lawyer yesterday calmly, glibly, he said he slowed down to practically a stop and he said—there was an objection because "practically stopped" could mean a different thing to each of the 12 jurors. He was asked to define in miles an hour what it was and he said about five miles an hour, and there it stood in cross-examination.

Lo and behold, in the afternoon we have his sworn answer, made with the assistance of his attorney, apart from the confusion of any court room, inquiring about the exact same speed at the exact same instant and to that he says 20 miles and hour and, confronted earlier with questions which inquired as to whether he appreciated five miles an hour and 20 miles an hour and the difference between them, he said he definitely did appreciate the difference and that

there was no room for confusion in his mind about those two speeds.

How do you account for that kind of testimony from a witness, except that in the most charitable light he doesn't know accurately what happened out there, and he can't be accepted as a credible witness. Is there any other conclusion you can draw from it? Mr. Mahony used the word "uncertain" in describing O'Brien's testimony. If O'Brien's testimony is [709] uncertain, what adjective do you put on that kind of testimony to which I have made reference, and again, please, this is not testimony produced by somebody that doesn't like Dr. Hobart which he can challenge himself, this is his own testimony.

Now, there is a great deal of talk here by my brother in the argument preceding mine about the position of O'Brien's truck in the road with reference to lanes. I am going to prove to you this accident happened because Hobart, when he got near O'Brien, turned left into O'Brien's truck at a time when, apart from the turn to the left by Hobart, these vehicles would have passed each other without contact, and that even should you find that O'Brien was a foot or something slightly more than a foot to the left of the lane with the left wheels of his car, that that will be wholly immaterial because I think you can be convinced and I think the evidence will demonstrate whatever the positions of these automobiles with reference to the line, they would have successfully avoided contact with each other except for a last minute turn, to the left as they passed, abreast, by Hobart.

My brother, in his argument, to get back to what I started to say, said to you that O'Brien's truck was in its left side, to the left of that lane, as it came down the road and that the overwhelming weight of the evidence so demonstrated. Well, Dr. Hobart doesn't say that and Doctors Hobart testified, I presume neither Mr. Mahony nor Mr. Buzzell

can complain [710] because Dr. Hobart said to you yesterday afternoon that until these vehicles were four or five car lengths away from each other, until that instant, O'Brien was in his own lane. There isn't any question about it, is there, that Hobart said that?

And there is the refutation of that argument. Again, not from anybody brought here by O'Brien, but from Hobart himself. Now, Hobart, to be sure, would have you believe that within the space of the last four or five car lengths that dividend these automobiles from each other as they came down the road, that O'Brien turned left and caused the accident. Without that Hobart is lost as a plaintiff and as a defendant, isn't he, and for that reason Hobart tells you that that event happened, but when you translate the opinion for that observation of a turn to the left by O'Brien, again, please, on Hobart's story, you know that it was less than a second from the time that O'Brien was, according to Hobart, on O'Brien's right lane and in the right lane to the moment when these cars had their collision. Less than a second. Demonstrably so. Hobart is doing 30 miles and hour, 45 feet a second. Hobart says O'Brien is doing 40 miles an hour, 60 feet a second, and that dividing 60 to 75 feet, four or five car lengths, at 15 feet, which is a car length—what is the answer to that Mr. Buzzell, when you argue about where O'Brien was on the road? What is the answer to Dr. Hobart's evidence that O'Brien was in his own lane up to that point of travel?

[711] And they want Whitney relied on as a witness. All right. You get the answer to this case from Whitney. Because Whitney, a gentleman who took the witness stand, told you that Hobart turned left just as the contact took place—didn't he? Who was in a better position to see it than Whitney? O'Brien doesn't observe this thing with great particularity. All he sees out of the corner of his eye is something coming at him. Hobart, of course, says he

didn't turn left, so does Mrs. Hobart, but Whitney says Hobart was turning left and was turning left when the contact took place.

Now, is there something in this picture apart from the testimony of Whitney that corroborates what Whitney has said to you and what O'Brien, by inference, says to you, namely that the accident happened when these vehicles turned left? I invite your attention to the circumstances that were developed yesterday afternoon when Dr. Hobart was on the witness stand. Here is a man driving over a road strange to him, traveling 30 miles an hour, on his way to Vermont, and it is 1:30 in the afternoon. Use your common sense as to whether or not there was any hurry to get to his destination.

Accepting the story he gives you, he is one foot away from the line, and Mr. Buzzell defined the line as the north line of the center lane. One foot. The width between my foot as I place it here and that rail.

This accident happened as Dr. Hobart passed opposite [712] the construction, and who says so? Dr. Hobart says so. Mr. Foreman and Ladies and Gentlemen of the Jury, and Mr. Buzzell, I propose to read from page 33 of the transcript of the evidence, starting at line 20.

"Q. How close to the construction were you when the accident occurred? A. The construction is right there in the right lane.

Q. Were you going by the construction? A. Yes.

Q. You were going by it? A. Yes.

Q. All right. You don't want to change that testimony, you were going right by the construction when the accident happened? A. No, sir."

So Dr. Hobart's story to you is he is passing opposite this construction when he has this accident. He has told you he is a foot, that distance, but I suggest to you your common sense tells you he was traveling in a space where

he found himself too near that construction on his right as he passed opposite it and that that prompted him to do what Whitney says Whitney saw him do, turn somewhat to the left, and when he did that he hit O'Brien.

Now, there is the story that comes to you from the witnesses, except Mrs. Hobart, who told you her story this [713] morning. I have no quarrel with the proposition that lady is trying to tell you, as honestly and as best she can, what she remembers of the event, but analyze her story, if you please. She is giving you her best memory of what she saw when the vehicles were 75 to 100 feet away from each other and that is a distance a little more than the length of this court room. To rehearse it again, they are dividing up that distance so that literally within a split second these vehicles have had their contact, from the moment she first observed O'Brien's trick, and that is her story as she gives it to you, so an analysis of this, and I have tried to be fair with the recollection I have given you of the testimony of the witnesses, I have quoted and read from Dr. Hobart's statement, so there could not be any doubt about it, and I suggest to you in your memory I hope you will agree with mine as to what I have said about Mr. Whitney's testimony.

Analyze his testimony. This accident happened when one of these vehicles, at a time when they were passing opposite each other, with room to pass, turned in such a way that it came in contact with the other. There was no reason in God's world for O'Brien to turn to his left at that point. There was a reason, a compelling reason, why Hobart, at that place, on this strange road, strange to him under the circumstances which confronted him, almost of necessity had to turn before this narrow distance of one foot between him and the construction proved to be too narrow for a safe passage [714] opposite the construction, and they can talk about the police officers, and they can claim numeri-

cally, all the witnesses they want, but I suggest to you when you get through considering this according to your good common sense, you are going to find Hobart turned into the wheel of O'Brien's truck and caused all the events that followed that contact between them.

To resort to what Mr. Mahony said in the beginning of his argument, and to refer again to what I said to you, it is sufficient, for the purposes of my interest as a counsellor for a defendant, that you find that Hobart contributed, even in the lowest degree, by his negligent conduct to the happening of this accident, but I am confident your verdict won't stop there, that you will go beyond that and find that this thing, as I see it, resulted wholly from Hobart's conduct, turning to his left.

I do not believe you are going to come to the question of damages in Dr. Hobart's claim, but I am compelled to discuss, as Mr. Mahony was, to discuss all aspects of the evidence and I would like to trespass on your time to discuss Hobart's claim for damages. The evidence shows he had injuries but they were not, as I characterize it, in any way serious. I think that the record of the Massachusetts General Hospital, a very reliable institution, bears me out. He had a chest injury and there was something which needed an [715] exploratory operation and they opened him up. They found a tear in his liver one centimeter in size, one-third of an inch or thereabouts, which had sealed itself off and for which no stitches or surgical repair was necessary. The proof that this procedure was a comparatively minor surgical process is in the fact that within two days after it there was a direction given that he could be up from bed, ambulatory, on June 25. On June 29 he could be out of bed as much as he wanted, ambulatory as desired, the hospital record said. He is free to go to his vacation in Vermont on the date of July 2nd, something under two weeks from the date when the accident happened.

He has had some difficulty with his heart and the record, as I heard it read, is replete with the proposition that it is hypertensive, a high blood pressure condition, but accept, if you choose, all the testimony of Dr. Myers who I don't question was a qualified heart man, that there was a condition that caused him some difficulty, but if you accept that much of his testimony, you will accept the remainder of his testimony that this man was well from the heart condition, whatever happened to him, on the date of his discharge from the hospital, and you get a further picture of this man's condition medically when you refer to the note in the hospital: "Asymptomatic". Asymptomatic some day or two before his discharge, and from the doctor himself yesterday afternoon you learned when a hospital records that in a record, they are describing a man without [716] symptoms. Without complaints, said Dr. Hobart.

I argue to you that Dr. Hobart had made a substantially complete recovery from whatever happened to him in this accident not later than the day of his discharge from the Massachusetts General Hospital. I suggest to you that you examine closely and test by the judgment of your own common sense the claim he makes to you he couldn't resume his work when his vacation was over on August 5, as completely as he did it before the date that this accident happened. We can't check Dr. Hobart, because he doesn't work for anybody as a person might who works in Jordan Marsh, where we know by a record, so we have to rely on his word, unsupported.

Should you get to the damages in his case, test him as to his credibility as a witness, test him as to his injuries and see whether or not, in your judgment, the claim of disability lasting as long as he said it did was what you find it to be.

Ladies and Gentlemen, if Dr. Hobart was contributorily negligent in any way, he can't recover in the case in which

I am interested but I am satisfied, as I said, that you are going to find that Dr. Hobart, passing opposite this construction at a time when O'Brien was in his right lane, as Dr. Hobart says he was up to the point when they were four or five car lengths away, Dr. Hobart then turned his vehicle to his left and for the purpose of this argument, whether O'Brien's car [717] was somewhat to the left of the line in the road or not, it was the turn to the left that caused this accident that Dr. Hobart did and I suggest he is not entitled to recover against O'Brien and I am not going to argue anything more because it isn't part of my province to do so.

I thank you, Mr. Foreman and Ladies and Gentlemen, and I follow Mr. Mahony in expressing my appreciation for your courtesy and patience. Thank you.

[718] AFTERNOON SESSION.

2:15 p.m.

Closing Argument by Mr. Prendergast.

Mr. Prendergast: May it please the Court, Mr. Foreman and Ladies and Gentlemen, it won't be long now. And I understand you had a good lunch and I'll bet it was better than the truck driver had the day this accident happened, and I hope it didn't put you to sleep, as my brother would like to have you think happened to our truck driver on the day this accident happened.

Now, please don't judge the case on the number of witnesses because if you do you are going to be very sadly mistaken and sorry by the time you reach the end of your sitting. There isn't much doubt, in my judgment, before the end of this sitting is over you will have cases in here where you may have only one or two little children, nine or 10 or 12 years old, as plaintiffs and you may find 10 or 12 automobile drivers who are turning around and contra-

dicting or trying to contradict and you would rather believe two children and you will find they are telling much nearer the truth than the adults on the other side.

The other thing I want you to bear in mind is this, if you will: Every automobile driver has a right on the road. Every pedestrian has a right on the road. Each person has the same right on the road. Nobody has the exclusive right on [719] the road. So the truck driver has got as much right to that highway, as the automobile driver and the automobile driver has just as much right to the United States highway as the truck driver, so no prejudice should be brought to bear upon the view you may have of this case.

Mr. Mahony started off, and by the time he was through, and particularly by the time he was through with his damages, I began to say to myself, well, Mike O'Brien not only got the needle from the doctors but now he is getting it from Mr. Mahony. Mr. Daley followed Mr. Mahony, and then Mr. Buzzell followed Mr. Daley and I couldn't help but say not only did Mike O'Brien get the needle from the doctor and Mr. Mahony, but now he is getting it from Mr. Buzzell because Mr. Buzzell certainly went into fairyland when he was trying to say to you that our driver fell asleep after having his lunch, and tried to infer to you nothing at all happened to the doctor, although the doctor testified they had left the Massachusetts Hospital at quarter past 12, had gone over to Howard Johnson's over at Cambridge and had gone in and sat down and had lunch for three-quarters of an hour or thereabouts and that he then, with his wife, left Howard Johnson's, which would be in the neighborhood of quarter or 20 minutes past one, and then arrived away out beyond Concord, almost in Acton, in time for this accident which occurred at the outset, at 20 minutes of two. In the case of a driver going 25 or 30 miles [720] an hour, that isn't the sort of distance they are covering, is it? You know and I know it would take much

longer than that, going at a much faster speed, to cover that distance.

Well, people can mislead you. I am not going to try to mislead you. My assistant came in three weeks ago when this jury was impaneled. That week, as far as my time was concerned, was wasted. We have been coming in, trying, for two weeks. After listening to these gentlemen, it seems to me I have not only wasted my time and my money, and don't think you buy those pictures for 10 cents, but I am wasting your time and then I am wasting the Court's time.

Let's see whether we are wasting your time or not. Before I finish there will be a lot of things I miss. I couldn't cover all the testimony of two weeks in an argument of half an hour, so please remember I am not avoiding anything that I should say or that you think I should say. I am simply forgetting to do it, and I am trying to pick out some other points that may be more important. There is no intention on my part to avoid it.

On the day that this accident happened two automobilists or three automobilists or more automobilists were on Route 2, which is a 30-foot highway, which had some lines on it. It had more than three. Look at the white line you see at various spots. Mr. Mahony tried to say the transverse line was down here. I say he is in error when he said that was it. [721] You will see the transverse line right up in here, and that is the transverse line that the man from the Public Works Department is talking about, and nothing at all about down here. There, it is very plain.

Mr. Mahony avoided mentioning that. Why? Well, you will understand why. Just as Mr. Mahony has attempted to try to create, by the way he has handled the damages situation, that we have tried to put something over and these damages were not the result of our actions.

From the very beginning when I got into this case I was

out to get the facts, the truth, and I spent my money to do it and I have spent my money to convince you people my man was right and that the pictures those people brought in to try to convince you we were wrong proved we were right.

He starts off talking about shoulders on the road. Take a look at the two men, one practically behind the other. That man's foot is a foot long, and that one, and if they are not four feet apart, I am surprised. Don't take just those men. Take them all along, any place you want. There is one walking down. Look at the bunch of men here.

All these shoulders are certainly five or six feet, I think you will agree, and I think your would certainly say it has been your experience, in traveling along highways, you see these roads with their guard rails at least five or six feet from the highway so they won't interfere with the automobiles. Take [722] a look at that officer; he isn't even on the highway. If there isn't a foot and a half or two feet on each side of him, I would be surprised. They are their pictures, his pictures. The pictures he brings in from the police department, and that Monday or Tuesday, after the doctor made such a show on the stand, he brought them here as though to say, "What is he wasting our time for?"

Just look at these pictures. For once in my life I learned something. My friend here says, get those negatives and let's show the people what the story is. They are setting there. Lines are so deceptive; pictures can be so deceptive. You people in the top row can see much more what I am going to show that the people in the front. Take a look at those two pencils. Do you people in the front row think you could estimate the distance between those two pencils? Do you think if you stood up you could tell as well as the men in the back row? Supposing your were to stand higher, what do you say, don't you think you could then see better what the distance was between the pencils?

And if you came out here, couldn't you, and when you got up here, couldn't you see exactly what it was?

That is the trouble with pictures. You can be so misled, and I am going to ask you to do this; There is a line, there. When you take this picture out, I will ask you,—you see that line there? I submit that line was not made by the [723] same wheel that made that. When you go outside, if you put your ruler down, you will see I am right: Lay that along the edge of the line, and what do you see? Do you see the line on the right lane? Did you see how much difference there is in it? Do you see how far above that line this ruler is and how much farther over it goes? I submit that line was made by our left wheel and I submit this line was made by our left wheel and that line right there, and I will ask you to decide yourselves; I am not going to tell you what it was. I submit it may indicate to you that is the line of the Hobart car that turned to the left and knocked our wheel out of commission.

My brother said to you, and I am asking you to use your own eyes, don't take anything I say. I have spent money to get this for you and I have spent money that will help you and I hope that I haven't thrown it away. You look at that line there. There isn't any doubt that line goes to there, and there is no doubt that anybody that has eyes can see it goes across in front of the door so the reasonable inference is it goes across to the righthand front wheel of that car and there isn't any doubt, in my opinion, that that is so.

Furthermore, you see a flat tire, and I submit that is the mark of a flat tire, where it was pushed by our car and that line beginning there, and I am asking you to decide it yourself, that line right there could have been made by the car belonging to Mr. Whitney.

[724] I am going to ask you to bear in mind one other thing, and it is in the pictures and you can decide it. I

will rise or fall with it. There are three lines right there. You get those pictures and you will see there are three lines right there. They are made by two cars, by that truck there and they are made by the left wheel of that car there. There they are, right there, as plain as day. Down here is where the Hobart car was when it landed after the accident, down in there.

I ask you to do another thing: Don't pay any attention to the position of these signs because they don't mean a single thing. For instance, how could that cop's car be in there if that sign was there when the cop's car pulled in? It couldn't. Somebody would have to move that sign, and am I fair and honest when I say that somebody put the sign there after the accident was over and after that car as put in there? There is the car, right up against the thing, and there is the sign in back of it.

[725] Please don't blame me for getting enthusiastic for my client because I hate to see a client lose when he shouldn't lose, and particularly when he shouldn't lose when the facts are with him.

Mr. O'Brien started out that morning, going to work. It came to around one or 1:30. Why should he be in any hurry? He is a widower; the longer he worked, the more pay he got, so why should he rush home?

Well, lo and behold, at some time he arrives in the vicinity of this location, at a time when he is following another truck with some packages and he is going to start to go up the incline where this package may fall off and, lo and behold, he turns around and says, I saw, on the righthand side, coming down some place, a car or two cars. They started to say it didn't happen. But their own doctor said it happened, if we are so believe him.

And here is the transcript of his testimony, on page 27

"Q. And then up to the time that you were within 50 or 100 yards of where this construction was going

on, you were operating in the righthand side of the road, weren't you? A. Yes, sir,

Q. You were over on the righthand lane, weren't you? A. Yes, sir."

[726] Now, isn't that bearing out what O'Brien said? That man is an intelligent man. He has got as much education as anybody can expect to, to be the doctor that he is. He knows what he is talking about, or he should know what he is talking about. He should know what part of the road he is on. You can't make a doctor say something he doesn't want to say. If you could, what could his patients do with him? So there, by his own words, he bears out his statement as he came down the hill he wasn't on the righthand lane. All right. O'Brien says, I am on my lane and I am coming along over here. And what do those honest witnesses that my friend talks about, the honest witnesses—well, Mrs. Whitney says he was, O'Brien was over on his own side of the lane. Mr. Whitney says he was. Those are the honest witnesses. They want you to believe them; I want you to believe them.

Lo and behold, Mrs. Hobart comes along and says, no, they weren't, no, he wasn't. O'Brien was never on his own side of the road. That is the story, in substance, from Mrs. Hobart. Dr. Hobart gives so many stories that I don't know which one you are going to believe. One minute he doesn't see our car until he is only a few feet away and the next minute he has seen our car when he is 100 yards or more away from it. Which story you are going to believe, I don't know, but at least he says when he saw our car the first time it was over on its own side of the road. You have got four people out of [727] five saying it, namely Hobart, Mrs. Whitney and Mr. Whitney and O'Brien—if they want to go by numbers, which I ask you not to do. But at any rate, if that is the story, he is over on his own side of the road.

Now, let's go back to this Concord picture. Did he come down the street on the righthand lane or not? Well, to show you how fair and honest I try to be, I skipped my four o'clock appointment a week ago Friday—at least if I didn't it seems to me the gentleman would have told you I had some peculiar odors about me. I went out to Concord and, as an ordinary citizen of Massachusetts, I went down with my friend and talked to this gentleman I had never known, and he admitted he never saw me. I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened. That is attacking his credibility because certainly he would never in the world have made that remark, Mr. Forenian and Ladies and Gentlemen, if he, the man from Concord, knew the righthand lane at that time was blocked, any more than you would or anybody else.

So I submit that the doctor came down on the righthand side of the road as he says. Now, lo and behold, we are over [728] on our righthand side of the road and they are over on their righthand side of the road. Now, Mr. and Mrs. Whitney come along and they say, no, we were following the middle. We were following them in the middle lane.

Do you remember when I said to Whitney, "All right, you saw a truck?" "Yes," "You saw its position?" "Yes," "You were following the Hobart car?" "Yes." "Had you put on your brake to stop your car at any time after seeing our truck, up to the time the accident happened?" He said, "No." "If you people were following Hobart down the street that day in your car, only 50 feet behind him, and you saw a position of danger in front of you, if you saw any indication at all that those cars

were going to come together, you would have brought your car to a stop, wouldn't you?"

That is the common sense to this thing. When they are 50 or 60 feet apart, there isn't the slightest danger to the Whitneys. He is just watching where he is going and there are the cars and there is the truck in that line and without any more ado he is going along and the truck is going along, but all of a sudden something happened. Well, now, what happened? I am not interested in lanes. They can twist lanes, or lines, any way they want. I am talking about the men right there looking, the people that are seeing what is going on.

There is no accident going to happen to Whitney. There is no accident he can see that is going to happen to the [729] doctor, because Whitney would have stopped. Lo and behold, what is the next thing that Mr. Whitney says to you? He said Hobart's car turned to the left. We came in here and said Hobart's car turned to the left. They would expect us to have Mullaney come in and falsify, commit perjury, because he didn't see it. We don't have anybody change his story between Friday and Tuesday, or between the date of the accident and the present time. Mullaney gave his story; he knew nothing as to the movements, what happened except the movement of the car. Now, lo and behold, Whitney turns around and says that car turned, the doctor's car turned to the left. We claim it turned to the left. Haven't we proven that it turned to the left? Haven't we proved right out of the witnesses supplied by the defendant that that car turned to the left? What more can we do? We can't buy witnesses, we can't supply them and we can't have them standing there, waiting for the accident to happen, to watch to see what happens.

You will get some pretty good education on the automobile cases, from sitting here. You will wonder to what extent you have to go to protect yourself and your family

if an accident happens. What do you have to do to prove your rights?

Lo and behold, the thing that surprises me is another thing: Mrs. Whitney knows the speed, the same as her husband. Mrs. Dr. Hobart knows the same speed her husband knows. [730] Each one of the wives knows the same distances the husbands know; each one of the wives knows the same movements of the car. But Mrs. Whitney misses on one thing. When I finally put that crucial question to her, "Did you see Dr. Hobart's car turn to the left?" She said she didn't know. And when I said to her, "Will you say it did not turn to the left?" All she could say was, "I don't know." She wouldn't say it didn't turn to the left.

What is the answer? The answer is very simple. This is a case of where one car, only, made that bad turn that ended up in Mike O'Brien living in hell for the last four years. No matter what my friend Mr. Mahony may say, and I am sure if Mr. Mahony ever gets to the age Michael O'Brien is at and loses part of his lung, he will be the one big fellow to cry about it, and don't you forget it, and he will regret the day he stood up in front of 11 people and attempted to belittle the situation.

When the accident happens and Mike—and the thing is happening, and you say, this "V" shape, where did that come from? Why is it they have the gumption to turn around and stand in front of you people and say to you, There is the mark of the right wheel. Why do they pick that out? You see that mark? If you say that is the mark that hit us, it couldn't be the right wheel because Hobart's car couldn't get in underneath our car and go over and make it, so that is what [731] the thing comes down to. I wish to heaven there was a place where I could have gotten these pictures four times as big because if I could these marks would have been so far apart—you see.

that picture is taken maybe 100 feet, 150 feet down the street. The camera is that far away. That is why the lines are crowded up on each other. If it had been possible to get it bigger, you would see these lines are slowly pulled apart and that is the whole picture, as I submit this case happened, when O'Brien was hit the thing is knocked right out of his arms. What happens? He loses control of the thing.

Well, if he was hit as the plaintiffs would have you believe, where they were like that and he was like that, then if we ever hit him like that and this automobile up here was only 50 feet behind and coming 30 miles an hour, in the flash of an eye wink that is what would have happened. This car in here, the doctor's car, would have been crushed and there isn't any question about it.

I asked the Mrs., the female doctor, this morning, "Did your car twist or twirl?" She didn't know. But isn't it a funny thing everybody says that when this accident happened the Hobart car backed up or was pushed up into the position it got into? If that is so, Mr. Foreman and Ladies and Gentlemen, will you tell me how it was that it was across the road? If, when we hit this car, it backed up, it wouldn't be facing that way, would it? Not one bit. [732] Assuming this is the north side of the road, it would never in the world be facing in that direction, no matter how long they argue or how much they say.

What time did we come in, your Honor?

The Court: Take your time.

Mr. Prendergast: I don't want to tax over my time.

The Court: There is no limitation on time.

Mr. Prendergast: You find that car in that position, then it got into that position for one very simple reason. Bear in mind we are traveling along 25, 30, 35 miles an hour when that happened, what happens? See that? That is all you do, is throw it right out of position.

We have proven to your satisfaction, I hope, that that car turned; that the doctor's car turned. We have proven to your satisfaction, I hope, that, through Whitney, that there was no accident going to happen until the time when the doctor's car turned. The doctor's car turning and whacking us caused the accident, and nothing else. And the car goes back in there.

Now, do you see the extent to which they go? If Mullaney wasn't prejudiced and if he was trying to be fair and decent and honest with you people, as I submit he was, wouldn't he have gone further in the testimony as regards Mr. O'Brien's actions and injuries than he did? What does Mullaney say? "All I know is all of a sudden we are whacked, [733] the thing goes to the left, this fellow falls over and I grab him by the shoulder, trying to pull him up." Certainly nobody ever intended to create in your mind that this man was laying on the floor, because we had talk about the gears. You and I know that the gears are in the middle of the car and you certainly couldn't fall to the floor and get between the gears and the seat.

But getting technical, just as he got technical about the question of phlebitis, do you remember when the doctor was on the stand Mr. Mahony started, "Well, Doctor, the Saugus Hospital record shows phlebitis, doesn't it?" And I jump up and I say, "Where does it show that?" He says, "Oh, wait a minute. Come up here, Doctor, read the last line in the Memorial record" and he reads the last line, and that line said there was phlebitis. Then he drops it, but he reads along all of the Memorial record, every single line in it, if you will remember, up to one point, the phlebitis. I am beginning to wonder, "What does this mean?" So I said, "Well, Mr. Mahony didn't ask you to read the last line, Doctor, when you just finished, did he?" Mr. Mahony says, "What line?" Remember I says, "Wait just a

minute?" I walked over, and said, "That one doubly underlined there."

He had a reason for that. He thought I would let it pass by and that he would be able to get the idea across that phlebitis caused this infaret and nothing else. When the [734] doctor turned around and explained, after I asked, that that phlebitis came after the infaret, out the door went his evidence.

Just as, I submit, if he was trying to be fair and square, you people know there are thousands of doctors in Boston. You people know there are very good experts in Boston and that in addition to the people that did the actual work on my man, I put a specialist on. Do you think for a minute he couldn't afford to hire a specialist to come in and prove we are wrong? Do you think Mr. Mahony couldn't get the money to go out and hire a specialist to say that the infaret is not due to this accident, that the hernia is not due to this accident, that the needle in the back, pumping quarts and quarts out of that man was not due to the accident? Do you think he couldn't afford to do it? Of course he could. But did he? They stand up and try to make you think they are going to be 100 per cent honest and they give you the impression they are, but why not deliver the goods? Why not, instead of him trying to tell you about blood going through the heart, and if he knows as much about that as I do, then he doesn't know anything other than the fact that blood does through the heart. Why does he create that blood has to go through the heart to get to the lung? Let him get a doctor in here to explain all that if he wants to. No.

Now we will get down to the damages. On June 21st [735] this man, who had come from the old country, as a lot of others of our ancestors have done and as a lot of people have done, and he is out driving a truck. He is 69 years old, weighing 190 pounds and he is o.k. physically.

If there was anything the matter with him physically, you would get the evidence.

Now, what? He is driving his truck and he has gotten the injury they have described, and I am not going to, like Mr. Buzzell did, try to repeat the hospital record. He gets the damage to his legs and the fractured ribs and the other things and he is taken to the Emerson Hospital. And Mr. Mahony tries to belittle him by talking about the Emerson Hospital and what a boomerang that letter must have proven to Mr. Mahony, showing that the Emerson Hospital apparently didn't know what they were talking about. On the day of the accident, when they let him go home, they didn't know what they were talking about, and they don't know it until six or seven days later, and then six or seven days later that hospital has the nerve to write a letter to Mike O'Brien. They don't say, "Come back to us." They don't say, "Come back to our hospital." They say, "Go and see your doctor, you have got a fractured rib or a couple of fractured ribs," when the actual ribs show there were five or six of them fractured.

Lo and behold, an officer comes down and is talking to him. Do you think Mike O'Brien, with his ribs broken, with the hernias he was carrying around, with the insides of his [736] body having been punctured so that blood was oozing from it, do you think he was a bit interested in what the cops were asking him? Would you be?

And, lo and behold, he goes home and he caves in. And after that he is lugged off to another hospital and dope after dope after dope is thrown into him. Do you think that man was interested in living, or interested in what somebody was asking him? Would you be interested in talking to somebody, or praying to your God you wouldn't die?

Well, in due course all of these things appear. That man has suffered, suffered, suffered. He is suffering, suf-

fering, suffering, today. He hasn't got the lungs God gave him when he was born and which he should be allowed to die with, and that I am sure become very important to each and every one of us the older we get.

He twists the facts again and he says for years before this accident he was only working part time. As I remember the testimony, he said he didn't work the winter before the accident, so that doesn't make any difference. Ted Williams had a value of $80,000 to the Red Sox. He had some trouble with his Mrs. Suppose he didn't work all last summer because he continued to have trouble with the Mrs., and then he was injured in an accident last November. Do you mean he couldn't claim an earning capacity of $80,000 just because he didn't work that few months? Of course he could. There is the [737] question of impaired earning capacity. You may be a high class musician and may have been earning all kinds of money as a musician or concert artist. If you get into an automobile accident, do you mean you couldn't say to a jury you had such a training and value? Of course you could.

So this man's earning capacity, or impaired earning capacity, was worth, I am calling it $100 a week. He said $92. For three and a half years, with the exception of about one week, he has lost his impaired earning capacity totaling $22,000, approximately. He is entitled to every single cent of that back, just the same as if any one of you people went out this afternoon and bought a new car and paid $4,000 for it and on the way home you happened to get into an accident and your car was damaged, wouldn't it be a terrible thing to come in and argue later on you are not entitled to $4,000, you are only entitled to one or two, which is what they are attempting here. That man is entitled to impaired earning capacity up to today.

In the meantime, he has had medical expenses—it is around $18,200. He has had medical expenses in the past

which total approximately $3,500 to $3,700, making a total outlay to date of in the neighborhood of $22,000 to $24,000, every penny of which he is entitled to.

Does that mean the end of this case? Of course not. I can't come back and beg for more money later. You have got the testimony of this man as to his future earnings, as to his [738] future ability to work. I submit a man his age can't get up now, and—I submit he is entitled to $100 a week in the future and I submit, Mr. Foreman and Gentlemen, this man would have gone on 10 years, 10 years of healthy, rugged life. Even look at him now, a healthy looking individual, but pale as a ghost.

If you split that and give him five years, that would be $25,000 more, so that at the end of five years this man would have in the neighborhood of $47,000 to $50,000 he would have earned in that period.

On top of that you are entitled to give expenses, and so in closing let me say to you, go out and give him his expenses and give him what he has lost and give him what his pain and suffering is worth, because pain and suffering is worth a whole lot more than any few dollars you may have lost out of your pocket. That lung isn't there any more and he has to get half a breath instead of a full breath. He has had a stomach with two hernias and he has had his ribs and these punctures and has to have pills every day and he can't go to sleep in a normal fashion, so I don't hesitate, after all the years I have practiced law, I don't hesitate in this case, any more than I would with your neighbors and friends, to stand up and say to you this man's case should have a verdict for the plaintiff of over $100,000.

Thank you very much for your kindness.

CHARGE TO THE JURY

[2] The Court: Now, Mr. Foreman and Ladies and Gentlemen of the jury, I think you were impaneled November 29. We have been on trial for eight trial days and we have had approximately 22 or 23 witnesses. You have been very patient. There have been some interruptions because of other work I have been called upon to do.

I have watched you very carefully. You have been very deferential in your attitude toward counsel and I am sure they must say I have been towards them. You have paid fine attention to the evidence. You come here as ladies and gentlemen that represent the imperishable values symbolic of worthwhile, wonderful citizenship.

You are playing an important part, not in a drama because it isn't a drama; it is part of our way of life. It is an institution that goes back over thousands of years, not founded by man but predicated upon a foundation stone of worthwhile, wonderful supernatural values, having endured through many crises and standing out as a beacon light and as a consolation to those who live within our boundary lines, as an assurance that we have abodes of peace where men live and let live. It is a system that places the responsibility on 12 fine citizens representing a cross section of the population, men and women free from all forms of prejudice and bias, interested only in serving the foundation stone of [3] justice, in kneeling at that fountain and drinking of its precious water; the kind of waters that give us consolation whenever we see, from time to time, the hand of prejudice, the club, the suggestion of diabolical racial or religious discrimination; rising above and beyond that is our system, which brings you fine ladies and gentlemen into a court room.

There are some things I must say to you and I am going to try and say them as shortly as I can. You are what they call weighers of evidence. I thought it would be advisable

for me to tell you what I mean by that. When I say "weighers of evidence" and when counsel have said it to you, they mean you are the sole judges of the credibility of witnesses and the weight and value to be given to their testimony and, in determining the weight and value and credit you give to a witness and the weight which you will attach to a witness' testimony, you should take into consideration the conduct and the appearance of the witness. What is his interest in the result of the trial? And that doesn't signify if he has an interest in the result of the trial, that because of that he is untrustworthy.

What is the motive for the witness' testimony? The attitude and state of mind of the person, his willingness to be cooperative as he stood on the witness stand, his willingness to answer questions, his responsiveness to those questions, his consistency in connection with the answers to [4] those questions, the probability or the improbability of the witness' answers, the opportunity that a witness has to observe as to matters respecting which the witness is testifying, and the inclination on the part of the witness to speak the truth as to matters within his or her knowledge —you take all these matters into account with all the facts and circumstances. Physical facts and circumstances are very important.

You give to each witness full credit and value and you take the testimony of each witness in the light of that yardstick I have just given you and you will appraise its value, and that is exactly what the phrase "weighers of evidence" means.

Now, another thing, it is your recollection of the testimony that controls. It isn't the recollection of counsel and it isn't my recollection.

You have a right, and it is your duty, to draw inferences from those facts. Please remember the parties stand alike and, at the expense of being repetitious, they stand alike,

free from all bias or prejudice, because justice is always blinded with sympathy, blinded to prejudices because of a man's color, race or creed.

Also remember this, that when parties are on a highway, it has been said by both counsel, they have reciprocal rights. One has as much right to be on that highway as the other, subject to certain conditions which I will explain to you [5] later.

You may wonder what an action of tort is, and I am saying this, gentlemen of the bar, because this is the first time I have had occasion to speak to this jury or speak to any of the jurors. An action of tort is one for a wrong committed. It is an unjustifiable wrong committed without justification, where a duty is owed. In other words it is an unjustifiable wrong committed by one person towards another. I don't mean by that that it carries with it the connotation of anything sinister or anything so venal as to constitute a violation of a statute which carries with it penal sanctions. I am talking about civil rights and civil responsibilities.

The mere fact that an accident happened is not enough. The mere fact that an accident happened with damages or injuries sustained by a person isn't enough. For recovery you must have a wrong committed—bear this in mind—and, secondly, damages that flow, or that follow, rather, or flow directly and proximately from the wrong committed. What was the person's condition, for example, before an accident? What does the history of the person show was his or her condition? What was the person's condition after the accident? What were the corollaries that flowed from that? The weight of that is all for you. Those are circumstances.

As all counsel have well said, a party must prove by a fair preponderance of the evidence. Even balance isn't [6] enough. If your minds are in doubt, it isn't enough.

The burden falls upon a person who is seeking relief in this court in an action in tort to prove his case by a fair preponderance of the evidence.

Now, what is negligence, the negligent act or the negligent conduct of someone? Negligence is failure by a responsible person, either by omission or by action, to exercise that degree of care and vigilance which a person of ordinary caution and prudence would have exercised towards the person who is injured. It is ordinary care, ordinary prudence. It involves a breach of duty toward the person that is injured. There can be no negligence unless there is a duty owed. It is the doing of something or the omission to do something that constitutes the kind of a violation that spells out negligence.

Now, please remember this: The standard is not the least careful person; it is not the care of the most careful person. But it is the care of the ordinary, prudent, cautious person as he would have acted under like circumstances. So that you have a simple test, ordinary prudence and ordinary cautiousness.

I am going along to this case now. You are about to deliberate on two cases, and in one of these cases there are two defendants. I will ask you now to keep the division sharply in mind as I charge you on the law.

Case number 1: This is a civil action which was [7] brought by a plaintiff named Michael O'Brien, the drive of the truck. Now, please remember the order in which I take these cases is not symbolic of any thought of mine because I want to say to you, not by a single use of words, not by a question that I have asked, not by a circumstance, have I indicated to you a point of view on my part in this case, and I do not intend to do so. It would be doing a great disservice to either one of these parties litigant if you came to such a conclusion.

Here Michael O'Brien was the driver of the truck and

he asked for damages for injuries sustained, alleging that these injuries were sustained as a result of negligence on the part of Dr. Hebart.

In case number 2 we have a suit brought by Dr. Hobart. He asks for damages from Mr. O'Brien and from Mr. O'Brien's employer, John G. Donovan, who was the proprietor of the Utility Oil Company, and I will tell you more about that later on in simple language.

The crucial term that you must understand is the term "negligence". Please remember that, because each plaintiff bases his case on alleged negligence on the part of the other driver.

The dispute here between the drivers, and I say this in the light of the arguments that counsel have made, and I may say to you, in passing, that it is your duty to consider [8] the arguments of counsel and in so far as they may assist you in an analysis of the evidence, you have a right to avail yourself of the benefit of the argument, and I say this as it applies to the four attorneys who carried on in keeping with the best tradition of our courts. Well, putting it in simple language, number 1, that the accident was inevitable—that is, neither party was negligent, then neither driver can recover. Please bear that in mind. If the accident was caused by the concurrent negligence of both drivers, then neither driver can recover. If one driver was negligent and the other was free from fault, and I will explain to you what that means, in more simple language, then the one who was free from fault is entitled to prevail and it would be your duty to find in his favor.

Each of the drivers is a defendant and Mr. Donovan is a defendant, and has the burden of proving contributory negligence, and that is what they call an affirmative defense. By that I mean contributory negligence on the part of the other driver, and also by a preponderance of the credible evidence, using the tests I have given you.

I couldn't state it any better than the way it has been stated by counsel. Suppose I drive a car and I hit a pedestrian and the pedestrian claims that I am negligent and I answer, "Well, I was negligent but you were negligent also and you contributed to the accident." No matter how slight that [9] contribution of negligence was, you can't leave it to whimsey, to romance; it has to be predicated upon the solid basis of a common sense analysis, but if you find that there was negligence, no matter how slight, in the example that I give you, then that person would be barred from recovery. You can take that principle and apply it to this case.

Now, I have covered the question of negligence. I think I have made it clear to you what the burden is. The burden is the burden of proving by a preponderance of the credible evidence. That is not proving it beyond a shadow of a doubt or beyond a reasonable doubt, because that is the test in a criminal case, but proving it by the greater weight, the more cogent, the more trustworthy, the more reliable testimony, not predicated upon quantity but predicated upon quality and quantity, or quality alone. I do not suggest to you anything except that which leads you into the treasureland of truth; that's all I suggest.

Take the O'Brien case: The O'Brien case has only one defendant and that is Dr. Hobart. If negligence on the part of Mr. O'Brien was the cause of the accident, you would enter a verdict for the defendant in the O'Brien case. If Dr. Hobart was negligent and Mr. O'Brien was not, you would enter a verdict for Mr. O'Brien. When I put that in that order I beg of you to believe me that I have no order of preference; I haven't any.

[10] Now, moving to the other side of the case, so that I will set the other side of the case up in the opposite way, and that is against O'Brien and Donovan, if Dr. Hobart was negligent and his negligence contributed to

causing the injury, enter a verdict for both defendants. If, however, Mr. O'Brien was negligent and that negligence was the sole cause of the accident, then it would be your duty to enter a verdict for Dr. Hobart against Mr. O'Brien and Mr. Donovan, and I have set that forth in two alternatives. I have done that deliberately so that you understand that the order which I have chosen is indicative of only one thing and that is a desire that I keep out of your jury room, and I leave it to you.

The judge has a right reasonably to comment on testimony, but I am not going to comment on testimony. Whenever it is necessary to comment on testimony, I will comment on it but I am not going to comment on the testimony here. I think it would be unfair.

Now, the next question is, suppose you find in favor of Dr. Hobart, and against Mr. O'Brien, don't forget you have to find against Donovan, you haven't seen Donovan, Utility Oil Company—you would have to find for the same amount. They can only collect against one party. You couldn't make it divisible; you can only collect once.

There is no dispute about Mr. O'Brien, that he was operating the truck in furtherance of his business of the [11] Utility Oil Company, that he was acting and operating in the course of his employment.

I express no opinion in the outcome of these cases, but I must charge you—if I didn't I would be guilty of reversible error—if you reach damages in either case, I have to charge you on the law of damages.

Well, what is the test? What is the proper sum of money that will compensate the prevailing plaintiff—I am going to use that phrase—and these are the factors you must take into account: The pain and suffering. You reach that determination, whichever one of these litigants you find in favor of, and it is your duty to award fair and adequate compensation for past, present and future pain,

suffering, anguish of mind, any impairment of capacity to enjoy life, just, reasonable and adequate compensation for all discomfort and all physical inconvenience, past, present and future, which are attributable to the accident or to the injury which was received as the result of the accident, that condition being a proximate cause of the accident, and all that means is that the injuries which he did receive are chargeable properly to the tortious act of the person who caused them.

A person is entitled to reasonable hospital bills, medical bills. He is entitled to have his damages predicated upon the simple yardstick of an honest consideration of what you think would be a fair and adequate amount of money to [12] award the pain and suffering that the party received, whether it is Mr. O'Brien or whether it is Dr. Hobart, for if you reach that stage you must make that finding, in favor of either one or the other, but when you do, please remember this, that the yardstick for damage can be expressed in a very simple sentence, the diminution of a person's earning capacity. That is a yardstick which applies to everyone. It applies to the retired millionaire; it applies to the humble; it applies to everyone.

It is predicated upon a very, very simple, honest, fair statement that what a man has today or what a lady has today they may not have tomorrow and therefore the phrase "diminution of earning capacity" doesn't necessarily carry with it the idea that a man is worth, has a job—is he in a situation where he can't work? Has his earning capacity been diminished? Has his opportunity to be of service to society been harmed? I don't know. I can't say any more than that to you.

That virtually takes care of the whole situation. I think I have covered the position of the two parties that are seeking relief here. I think I have covered the question of damages very carefully. I think I said that loss of wages

was the yardstick of damage, the loss of wages, or evidence available to you, the weight of it being for you in determining how much money would compensate a person for the loss of earning power, and don't forget conscious suffering and pain.

[13] I think I have made it clear to you that a chain is no stronger than its weakest link. You have listened to expert testimony; you have listened to fine doctors that have testified. You will give to that testimony the weight that in the exercise of your judgment as fine, God-fearing, liberty-living American citizens you feel you should. Apply good horse sense and honest judgment.

If you decide either Dr. Hobart or Mr. O'Brien, or Mr. O'Brien or Dr. Hobart, is entitled to recover on the evidence and on the law in this case, please use the legal yardsticks that I have given you because you take your law from me. It is very simple. I have tried to spell it out in language which you will understand, devoid of legal phraseology which would create a cloud.

Now, I don't think I want to say any more about expert testimony; I think I have covered it enough. This evidence is going upstairs to the jury room. You are going to have a list of witnesses and you are going to have some forms of verdict which I have suggested that the Clerk get ready. I want you to remember this, and I know you will: The vindication of our system of jurisprudence, which is best exemplified by a recognition of these indelible marks, these wonderful attributes that are a part of the golden treasury of a system of laws that makes the United States of America the land of the free and the home of the brave—in spite of its faults and in [14] spite of its friends it has gone along for 170-odd years. Great men and women have developed its industries, have cut through the mountains, crossed over the hills, have built great educational institutions, have given us a body of laws that recognizes the

dignity of family life and the responsibility of a human being towards his God and towards his country, has given to us men and women who have souls that are of the same color, who spring from the same source and who die the same way. We want to protect this system. It never will be protected if parties that come in here seeking relief walk out of this court room with a feeling that they have not had their day in court, free from prejudice and bias, with a panorama of a modus operandi, and I mean by that a picture where fine lawyers appear, where they present in an able manner their cases and enable a party to come into a court room and have his day in court.

I have never seen a case tried where there were finer men than in this case, not a word of rancor, once in a while a smile, ruggedly, straightforwardly and militantly presenting the viewpoint of each lawyer, done in keeping with the best tradition of a profession, the perpetuity of which means so much to our civilization.

I want to close with that thought. I want you to be certain that when people leave this court room, all of these parties, they will have known that they have had justice [15] vindicated. I know you will not be afraid to do your duty. I know you will recognize the fact that you are 11 minds, that you are going to sit down reasonably, one consulting with the other, one being ready to be influenced by the moral yardstick of honest to God suasion, free from prejudice and free from bias. How did this accident happen? Who is to blame for it? What are the causative factors? What are you to do? That is for you.

I want to give you this further word of caution. No matter which plaintiff you find for, be careful not to take 11 figures, adding them up and dividing by 11. They call that the quotient system and it is a very, very, very wrong system because it does a disservice to the philosophy behind your presence here. Just think of what you have.

You came here by operation of law; one probably never met the other. You go into a jury room upstairs. You have your likes and your dislikes, you have your various associations, you have your sources of employment, you have your own standards of living. You have, far and above and beyond that, love for that flag and love for these imperishable values, and I know that you will carry on in keeping with the best tradition of a system of jurisprudence that will help to keep us living in abodes of peace where men live and let live. When you do that and you bring in your verdict, you will truly have carried out the meaning of the word "Verdict", because it comes from an old [16] Latin phrase, "veredictum", to speak the truth.

I am going to send these upstairs. I want you to know you are not measured by time. We don't want any verdicts by force or by the role of expediency. You go ahead and take as much time as you need. There will be no effort on the part of this Court to punish any jury, lock them in a room and keep them there. I want it known now that I don't subscribe to that. I know you will discuss it fairly and honestly and consult one with the other and then come to a common opinion, a common judgment.

You are going to have these forms. Michael O'Brien v. Hobart, and if you find for the plaintiff you assess damages and you would write the amount in there. Another form, Michael O'Brien v. Harold M. Hobart, and if you find for the defendant all you do is sign it, Mr. Foreman.

Now, Dr. Hobart's suit against Donovan and O'Brien, if you find for the plaintiff you do the same thing, you write the damages in there. If you find against Hobart you simply sign that form because it is made out for the defendant.

You will have the names of the witnesses. You will

have; also, the exhibits that are going in, and I think you are going to send these up to the jury room?

Mr. Prendergast: You said you were going to, yes.

The Court: Thank you very much. I have two forms for each case, one for the plaintiff and the other against the [17] plaintiff. All you sign is one in each case. You sign one in each case.

Will counsel come up?

[Conference at the bench:

The Court: Is there something you want to say?

Mr. Prendergast: No, thank you. You did well.

Mr. Buzzell: You did very well.

The Court: I think I tried to be fair. Is that all right, Mr. Mahony?

Mr. Mahony: It is one of the best ~~charges I~~ have heard you give.

The Court: Thank you.]

Do you want to go upstairs now? Then we will send the exhibits up to you.

[The jury retire at 3:45 p.m.]

[The jury return to the court room at 9:20 p.m.]

The Court: I have a note here, Mr. Foreman and Ladies and Gentlemen of the Jury, which reads as follows: "In the Judge's charge did the Judge state that all lines on roadway were to be disregarded in making our decisions?"

I am going to have Mr. Penney—this has been read to counsel and I am going to have Mr. Penney read what you can say is an answer to the question you asked me.

[The court reporter read to the jury that portion of the charge to the jury which appears in this transcript, [18] from line 22 page 4 to line 1 page 5.]

The Court: Of course the other question deals with the question of due care and negligence. Does that answer your question, Mr. Foreman?

The Foreman: No, your Honor, that does not. I be-

lieve, in the jury room, immediately preceding the phrase or phrases that the reporter has just read there was supposed to have been some mention of lines in the highway and instructions to disregard.

The Court: At no time did I make any reference to marks on the highway in my charge. Do counsel agree with me on that?

Mr. Daley: I agree.

Mr. Prendergast: I agree.

Mr. Mahony: I understand no reference was made to marks or lines on the road.

The Court: That's right. I was going to leave all the details and carefully refrained from referring to any physical evidence or to any of the testimony of the witnesses, if you will remember. The photographs were there and that was for you.

While I have you here I am going to read, and I told counsel I am going to read this, and it isn't unusual to do this and I only read it in an advisory way. I only read it for the specific purpose of trying to help you, fully realizing the fact that you have done your duty, you have worked hard, [19] but the Court is in complete satistaction and the state of mind which satisfies me completely that you are carrying on in conformity with the best traditions of our jury service.

I am going to read to you what was said in a famous case that was tried over a century ago and which has been used as a landmark, not for the purpose of serving as a mandate for any jury to surrender the formula for returning a verdict which is theirs, and not for the purpose of enlarging upon the power of a judge to direct a jury, but only as a medium by which you may be helped.

"The only mode, provided by our Constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of

cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any [20] future jury must be; and there is no reason to suppose that the case will ever be submitted to (a jury) more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. * * * But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments."

And don't misunderstand me; I am not suggesting, by this, that you haven't. I am just reading a few sentences from a case which has traveled down the golden treasury of a land and that has been very, very helpful over many, many courts of this land for 105 years and which is recognized as a landmark in our system of jurisprudence.

"And, on the one hand, if much the larger number of your panel (have reached a certain conclusion)"—I have to change the word here because this is a criminal case—"a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes

no impression upon the minds of so many men, (and women) equally honest, equally intelligent [21] with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath."

I am skipping parts because I feel that I ought to exclude anything which deals with the criminal features of a case because there the proof is entirely different than the proof is here.

"The jury room is, surely, no place for pride of opinion, or for espousing and maintaining, in the spirit of controversy, either side of a cause. The single object to be there effected is to arrive at a true verdict: and this can only be done by deliberation, mutual confession, and a due deference to the opinions of each other. By such means and such only, in a body where unanimity is required, can safe and just results be attained; and without them, the trial by jury, instead of being an essential aid in the administration of justice, would become a most effectual obstacle to it."

I read those lines to you with no desire to serve in any other capacity except that which will enable you, in the exercise of your sound judgment, to determine the issues, the issues that have been presented to you in this case.

I don't want to say any more because were I to say any more I might repeat a part of my charge and fail to repeat some other part and thereby render, unconsciously, a great disservice [22] to some one of the parties. I have no desire to do that.

As I told you before, fine citizens like you who gather in a jury room unhampered by any fungus growths, free from all forms of prejudice, friendships, favor, anything like that, that you sit down, and your course of judgment and course of procedure is the same as all other juries.

The fact that you have been out for some time is only indicative of the further fact that you are giving profoundly honest consideration to the testimony. I am happy to be here; counsel are happy to be here. If there is anything else I can say to you I will be very happy to repeat it. Does that answer everything, Ladies and Gentlemen?

The Foreman: It does, your Honor.

The Court: You may retire. Is there anything else you would like to have me say to you?

Mr. Prendergast: Somebody is saying something.

The Court: Is there anything else you would like to have me say? Why don't you confer there with Mr. Flynn?

[The jury confer.]

The Court: Counsel doesn't object if they confer?

Mr. Prendergast: No. We don't want to hear what they are saying, that's all.

The Court: Would you like to have us leave the court room so you can talk?

The Foreman: Yes.

[23] The Court: All right, we will be happy to. I won't be here. I will go out with you.

A Juror: We would like to have you stay for a little information.

The Court: If I stay I will have to have counsel. I will walk out and you write on a piece of paper what you want me to say. Then I will show it to counsel. Let me tell you why I have to do that: If I didn't do that—why don't you go upstairs? Take your time. If I didn't tell counsel I would be guilty of a reversible error.

[The jury retire at 9:33 p.m.]

Midnight

[Conference in the lobby:

The Court: All counsel have agreed that the following note be sent to the jury:

"The Court wishes to inquire whether the jury would prefer to continue their deliberations tonight or go to the Parker House and resume their deliberations in the morning."

(The message is sent.)

Deputy Marshal Shannon: They prefer to continue.]

12:55 a.m.

[The jury return.]

[24] The Court: As I understand it, the jury has agreed upon a verdict and I want to say to you those that can't get home—I was just about to go up and send you to bed. I was going to let you sit until one o'clock, but those who have no way to get home, I have made arrangements for you to stay at the Parker House at the expense of the United States Government. I think it is the fair thing to do. I understand that some of you come from Attleboro. They have accommodations in other places, but if you just can't get home, you can stay at the Parker House. All right; go ahead.

[The jury return a verdict.]

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United States Court of Appeals

For the First Circuit

No. 5172.

HAROLD HOBART,

DEFENDANT, APPELLANT,

v.

MICHAEL P. O'BRIEN,

PLAINTIFF, APPELLEE;

No. 5173.

HAROLD M. HOBART,

PLAINTIFF, APPELLANT,

v.

JOHN G. DONOVAN ET AL.,

DEFENDANTS, APPELLEES.

CONSOLIDATED RECORD APPEND'X TO BRIEFS FOR THE APPELLANTS

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COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Concord District Court
Concord, Mass.
August 14, 1952.

COMMONWEALTH

v.

MICHAEL O'BRIEN

Before, *Northrop, J.*

Appearances:

For the Commonwealth — Americo J. Sousa, State Police, Concord.

For the Defendant — Reuben H. Nitken, Esq., 110 State Street, Boston, Mass.

AMERICO J. SOUSA, Sworn

Direct Examination

Your Honor, my name is Americo J. Sousa, State Police Officer attached to the Concord Barracks. On June 21, 1952, at about 1:40 p.m. I was called to the scene of an accident on Route 2, 60 feet west of the Acton-Concord line. I went there as a result of a telephone call—I was not a witness of the accident itself. The following information was received. When I arrived at the scene I found that three cars were involved in a collision. Car 'A', a tank truck, operated by Michael O'Brien of 86 Kenmere Road, Medford, Massachusetts; Car 'B' a Chrysler Sedan, operated by Doctor Harold W. Hobert, 570 Manning Place, Washington, District of Columbia; and Car 'C' a Ford Sedan operated by Robert Whitney of Main Street, Ashby, Massachusetts.

Car 'A' was travelling east on Route 2—

Mr. Nitken: I would prefer that he testify by conversation rather than direct conclusion.

The Court: You didn't see the accident?

Witness: No, your Honor.

The Court: Anything about the accident cannot be testified to by you except by admission or direct statements by the defendant. If the defendant gave you any information as to how the accident happened you may so state.

Witness: I believe that is what I am doing.

The Court: You stated you gathered from information—I don't know where it came from—you can testify only to what conversation you had with the defendant or with others in the presence of the defendant.

A. Car 'A' was traveling east on Route 2—

Mr. Nitken: Object.

The Court: Who told you—gave you that information?

A. The operator of Car 'A'—Mr. O'Brien, stated he was travelling east on Route 2 at an estimated speed of 25 to 30 miles per hour as he approached the construction on the north side of the road, heading west. He claims he did not see anything else on the road. That is his statement. 'I was travelling east on Route 2 at about 25 to 30 miles per hour on the right lane, and I didn't see any oncoming traffic or notice anything unusual.' The road at that point is 30 feet wide, divided into three separate lanes ten feet each. The point of impact is shown by photographs which, if it may please the Court, I would like to introduce.

The Court: Show them to counsel.

The point of impact was to the right of the center of the road.

Mr. Nitken: Counsel has no objection to the photographs. (Photos shown Court)

The Court: Will you explain the photographs? (Photos explained to Court)

At the point of impact the useable portion of the road is only 20 feet, divided into two ten foot lanes, having ten feet of construction on the extreme right, heading west. The impact of the crash drove Car 'A' and 'B' diagonally across to the northeast side of the road. Car 'A' came to a stop against the safety fence on the north side of the road, facing north. Car 'B' came to a stop with the rear of the car against the fence facing south. Car 'C' came to a stop with the front end on the fence, facing north. The point of impact was to the right of the center of the two lanes which was open to traffic.

Mr. Nitken: I move that that be stricken out. I think he should quote statements and not give conclusions. Did the defendant point out the point of contact at the collision?

Witness: No, sir.

The defendant, the operator of Car 'A', a Tank Truck, and the operator of the second car, the Ford were questioned together at the Emerson Hospital. The operator of the Ford stated he was travelling west on Route 2, at an estimated speed of 30 miles per hour, the car in front of me, which was the District of Columbia Chrysler, was approaching the construction and was slowing down. The car in front of me pulled out so that he could—

Mr. Nitken: Object.

The Court: Was that in the presence of the defendant?

Witness: In the presence of the defendant and the operator of the Ford

The Court: Go ahead.

Mr. Nitken: Without being technical I would like—

to ask one other question, your Honor. I would just like to get the condition of the defendant at that time —did he understand what was going on?

The Court: You can.

The operator of Car 'C', the Ford, the second car, heading west, stated, 'I was travelling west on Route 2 at an estimated speed of 30 miles per hour—the car in front of me was approaching the construction and was slowing down. The car in front of me pulled out so as to get by the construction. I noticed this truck coming east was over the broken white line about two or three feet. The car in front of me applied his brakes. The truck hit the car in front of me and throwing it to the right against the safety fence. The truck curved over. As it did he hit me. He hit my left front and throwing me around up against the safety fence.' The defendant was present when this statement was made by the operator of the Ford. There was no point in which the officer could observe if he was under any physical strain. His statements were coherent. The only thing he complained of, was a pain in his chest. There was a passenger in each vehicle along with the operator, and all the passengers and operators were taken to the Emerson Hospital, where the operator of Car 'B' and the passenger of Car 'B' requested to be taken to the Massachusetts General. The request was granted.

The truck was damaged on the left front, and the second car—the Chrysler, driven by the doctor was completely demolished. The Ford was damaged on the left front. The weather conditions at the time were fair. Traffic was medium and the road was dry.

I would like to call the operator of Car 'C'.

The Court: Did you ever talk with Mr. O'Brien as to how the accident occurred.

Witness: Yes. The only thing he could tell, which was told to me in front of Operator 'C' was the state-

ment I read. 'I was travelling east on Route 2 at an estimated speed of 25 to 30 miles per hour, on the right lane.' I did not see any oncoming traffic or notice anything unusual.' That was the only statement.

The Court: Did he make any reply to the statement made by Mr. Whitney?

Witness: When Mr. Whitney made his statement in the presence of the operator of the truck, Mr. O'Brien stated he didn't see any oncoming traffic—nothing unusual—nothing to distract his attention.

* * *

No questions of the officer by Mr. Nitken)

ROBERT WHITNEY, Sworn

(Oper. Car C)

Direct Examination by Officer Sousa

Q. Tell the Court your name, please? A. Robert L. Whitney.

Q. Your address? A. Main Street, Ashby, Massachusetts.

Q. Tell the Court what you saw take place on Route 2 on June 21st, in the afternoon? A. I was travelling west on Route 2—

Mr. Nitken: Please speak up louder—I can't hear you.

A. I was travelling west on Route 2 in Concord, and about three car lengths behind another car and the right lane of the highway—the right lane of the highway was torn up so that we were forced to travel mostly in the middle lane. As we came to one place in the road where there was construction, the car in front of me was coming up to it. We noticed the truck over the white line and the truck hit the car knocking it out of the way and then it curved over and hit us.

* * *

Cross-Examination of Mr. Whitney by Atty. Nitken

X-Q. (Photos used) Mr. Whitney, did you apply your brakes at all before the accident occurred? A. Yes, I did.

X-Q. How far were you from the point of the accident before you applied your brakes? A. Oh, I was approximately three car lengths behind the Chrysler.

X-Q. That was when you first noticed the other truck? A. Yes.

X-Q. You were three car lengths behind the point of contact when you first noticed the truck? How far from the point of contact with the truck were you when you first applied your brakes? A. I was starting to apply them.

X-Q. How far from the point of contact were you when you first applied your brakes? A. Approximately three car lengths.

X-Q. You applied your brakes immediately when you saw the other car? A. When I saw the truck hit the Chrysler.

X-Q. You first applied your brakes when you saw the accident occur? A. Yes.

X-Q. At no other time did you apply your brakes? A. I had my foot on the pedal slowing down and when I saw the accident I locked my wheels.

X-Q. The first time you applied your brakes was when you saw the accident? A. I was slowing down before the accident occurred.

X-Q. This white line you talk about is this very visible? A. It's a broken white line.

X-Q. Is it a plain white line? A. Yes.

X-Q. Is this a broken white line? A. Yes.

X-Q. Where was the truck when you came in contact with it? A. He was over in my lane.

X-Q. It was resting against the wire embankment? A. No.

X-Q. Was the truck in this position when you first came into contact with it? A. No.

X-Q. How far into the road was it? A. It was about straddling the white line.

X-Q. He was astraddle of the white line when you hit him? A. When he hit me.

X-Q. When the cars came in contact he was astraddle of the white line? A. Yes.

The Court: The truck was straddling the white line at the time his car was struck by the truck is what I understand him to say. Did you try to determine which white line he means.

X-Q. Which white line do you have reference to when you say 'astraddle'? A. This one here (indicates on photo) The one to my left. I was travelling west.

X-Q. How far was it straddling that white line when it hit you?

Mr. Nitken: Your Honor, may I point out the white line he indicated—the white line on his left. The extreme white line. There are two white lines going down.

X-Q. Now, how far from the white line was the left-hand side of your car? A. I couldn't tell exactly in feet.

X-Q. Well, to the best of your ability? You are telling us in feet—exactly in feet how far the truck was—you told us in feet approximately 2 feet to the right of the white line at that point? A. Yes.

X-Q. What part of your car came in contact with the truck? A. The left front.

X-Q. What is that—I couldn't hear you? A. The left front.

X-Q. The left front? A. Yes.

X-Q. Is that the point at which you applied your brakes? A. No.

X-Q. I have no further questions. Thank you.

Examination of Mr. Whitney by the Court

Q. How far over the white line in the lane you were driving was the truck when you first saw it? A. The best I could tell—the white line was almost in the middle of the truck.

Q. How far away were you when you first saw the truck coming? A. When I first saw the truck over the line?

Q. Yes? A. Just over the other side of the construction before it met the other car.

Q. How far away was it? A. About four car lengths.

Q. About four car lengths? A. Yes.

Q. That would bring it up to the time of the contact. You say you were three car lengths behind the Chrysler add another car length to that it would be pretty close to the Chrysler when you saw it? A. Yes.

Q. Did you see it any distance before it hit the Chrysler or just when it hit the Chrysler? A. Yes.

Q. How far was it from the Chrysler when you first saw it? A. About two car lengths.

Q. About two car lengths from the Chrysler? A. Yes.

Q. You say half of it was straddling the white line? A. I would say that, yes.

Q. Did you have any talk with the defendant after the accident? A. No.

Q. Were you present when the officer talked with the defendant at the hospital? A. Yes. The officer brought me out to the waiting room where the defendant was.

Q. You heard the conversation the officer has testified to in the presence of the defendant? A. They asked me to tell my story. He asked me to ~~tell~~ my story in front of him, and asked him to tell his.

Q. And that was substantially the same as the officer has related on the stand? A. Yes.

Q. Was there anybody else in the car with you? A. My wife.

Q. Your wife? A. Yes.

* * *

Re-cross Examination of Mr. Whitney by Mr. Nitken

X-Q. At the time the officer first questioned you you told him the truck was only over the white line two or three feet? A. I said, approximately.

* * *

JEAN WHITNEY, Sworn

Direct Examination by Officer Sousa

Q. Tell the Court your full name, please? A. Jean Lillian Whitney.

Q. Tell the Court what happened on June 21st on Route 2 in the afternoon? A. After we passed the Rotary in Concord, heading west, I noticed the sign 'Two Lane Traffic, No Passing' because of the construction in the third lane to our right. We were about three or four car lengths behind the Chrysler before the Chrysler came in contact with the construction to his right. I noticed the truck before my husband did, because I made the statement 'look out, that truck over its white line. He noticed it—at that time he applied his brakes. The truck was about—when I noticed it—over the white line. It was three or four car lengths in front of the Chrysler, beyond the construction. Then the next thing I knew the truck hit the Chrysler. We had applied our brakes. I was thrown against the dash board when he applied his brakes and then the truck hit us.

* * *

Cross-Examination of Mrs. Whitney by Atty. Nitken

X-Q. Were you injured as a result of this accident? A. Yes.

X-Q. Have you filed a claim for injuries? A. No. We have talked with the insurance man.

X-Q. You have talked with the insurance man about your injuries? A. Yes.

X-Q. You have not had a settlement yet? A. No, we have not.

Mr. Nitken: Without taking your Honor's time, by indulging further into this matter Mr. Whitney also has a claim for injuries we would find if we called him back.

Mrs. Whitney: Yes, that is right.

X-Q. How fast was your motor vehicle travelling approximately 100 feet from the point of collision? A. Between 30 and 35 miles per hour.

X-Q. What drew your attention to the fact that it was going 30 to 35 miles per hour? A. That is a moderate speed, and that is what the sign is marked.

X-Q. No, that is not what I asked you. What drew your attention to the fact that you were going 30 to 35? A. That is the approximate speed I figured we were going before the impact.

X-Q. How did you arrive at that conclusion? A. Because that is a moderate speed.

X-Q. Did you look at the speedometer? A. No, I don't usually look at speedometers.

X-Q. How did you arrive at that conclusion? A. Because that is a moderate rate of speed, and my husband is not a speed demon.

Mr. Nitken: May that be stricken out.

X-Q. Now, how far away from the point of contact were you when you first noticed the truck? A. When I first noticed the truck it was over the white line—

X-Q. No, please answer my questions. That was a simple question. How far was your vehicle from the point of contact when you first noticed the truck? A. The truck was about eight car lengths before the impact.

X-Q. No, that is not what I asked you. Pay attention.

That was a simple question. How far were you from the point of contact with the truck when you first noticed the truck? How far away were you from that point when you first noticed the truck? A. From the point of impact when I first noticed the truck?

X-Q. Yes. When you first noticed the truck? A. When I first noticed the truck from the impact it was about eight car lengths in front of us. It was beyond the construction.

X-Q. That was when you first noticed the truck? A. Yes.

X-Q. Now, how far away was the truck from the point of impact when you first noticed it? A. How far away was the truck from the impact?

X-Q. How far was the truck from the point of impact when you first noticed it. A. From the point of impact the truck when I first noticed it was about eight car lengths from the point of impact.

X-Q. Now there were some signs of construction along the road? A. Yes, that is right.

X-Q. And the point of impact was toward Boston beyond a small point of construction on the road? A. Our impact was, yes.

X-Q. The impact between the truck and you? A. Yes.

X-Q. Then actually you first noticed the truck beyond that point of construction? A. That is what I said. The truck had not even reached the point of construction.

X-Q. The truck had not even reached the point of construction yet? A. No.

X-Q. What particularly drew your attention to that truck other than the fact that you say it was over the white line when it was beyond the point of construction? A. The fact that the truck was over the white line drew our attention to the truck.

X-Q. In total you were 16 car lengths away from the truck? A. When I first noticed the truck, yes.

X-Q. You were 16 car lengths away? A. Yes.

X-Q. There wasn't any reason to anticipate any danger? A. Not on our part, no, sir.

X-Q. Do you know when your husband first applied his brakes. A. He was slowing down for the construction.

X-Q. Do you know when your husband first applied his brakes? A. Before the truck hit the Chrysler.

X-Q. How far from the point of collision between the truck and Chrysler were you when your husband first applied his brakes? A. Three to four car lengths, approximately.

X-Q. How far in front of you was the Chrysler travelling? A. Three to four car lengths in front of us.

X-Q. Actually you didn't apply your brakes until the cars had the impact? A. No, sir. We applied our brakes two seconds before the impact. We saw the truck coming.

X-Q. Have you any idea how far a car will travel in two seconds going 35 miles per hour? If not, say so? A. No.

X-Q. You applied your brakes about two seconds before the accident occurred, is that right? A. We were applying the brakes. When the impact occurred the brakes were put on full.

X-Q. Were you knocked unconscious by the accident? A. I got out of the car as soon as the accident happened. Then I passed out afterwards.

X-Q. That is all, thank you.

* * *

Examination of Mrs. Whitney by the Court

Q. As I understood your testimony, you saw the truck over the white line before the truck had reached the construction? A. Yes, sir.

Q. Did you see it after that time? A. After it reached the construction?

Q. Yes. A. I saw the truck coming on toward the Chrysler and saw the truck hit the Chrysler.

Q. In other words you saw it before it reached the construction? A. Yes, about two feet to the west of the construction.

Q. Then you saw the truck before it hit the Chrysler? A. Yes, sir.

Q. How far was the truck from the Chrysler when you saw it the second time? A. About a car length.

Q. About a car length? A. Yes.

Q. Where was it with reference to the white line? A. The truck was just about straddling the white line.

Q. That would bring it over into the Chrysler's lane as the road was set up at that point? A. Yes, sir.

* * *

THE GOVERNMENT RESTS

* * *

MICHAEL O'BRIEN, SWORN

Direct Examination by Atty. Nitken

Q. What is your full name, sir? A. Michael P. O'Brien.

Q. Where do you live, sir? A. 86 Kenmere Road, Medford, Mass.

Q. And at the time of the accident by whom had you been employed? A. Utility Oil, Somerville, Mass.

Q. How long have you been employed by the Utility Oil? A. Approximately 17 year.

Q. In what capacity are you employed by the Utility Oil? A. Chauffeur-truck driver.

Q. Will you explain to his Honor what kind of a truck you were driving that day? A. An Asphalt Distributor.

Q. One of those large trucks with an asphalt bar behind it and you drop the asphalt on the road? A. Yes.

Q. How wide is your truck? A. That is a guess—according to the tire size I think it is 8 feet 4 inches or eight feet 6 inches, either one.

Q. Eight feet four inches or eight feet six inches? A. Yes.

Q. On the day in question you remember an accident happened? A. Yes, sir.

Q. You were heading toward Boston? A. Yes, sir, that is right.

Q. Were you driving in a line of traffic? A. Yes, sir.

Q. Was there traffic in front of you? A. Yes, sir.

Q. And would you tell the Court in the best of your words what happened, Mr. O'Brien? A. Well, I got up pretty close to the line—

Q. You mean the Concord line? A. Yes, sir. I had just let a little truck go ahead of me down at the intersection there—Bursa Oil—300 yards beyond. He was ahead of me. I was probably 25 to 30 feet behind him, following. Little traffic. There was a big pile of dirt where they were digging a trench. One lane was blocked. I was trying to keep over as far as I possibly could.

Q. Speak up louder so the Court and myself and the stenographers can hear you. A. I was trying to keep over as far as I could on my right side and I came to this big pile and a sort of an open space there. As I remember I saw this Chrysler. I might have been—I might be close to the line, but certainly I wasn't over it, because I was following a line of traffic. When the Chrysler hit me on the left side he spun me around.

Q. Did it hit your wheel? A. Hit the front bumper and wheel and spun the truck to the left.

Q. And that forced your truck to the other side of the road? A. Yes. From then on I didn't know anything until I got to the hospital.

Q. You went to the hospital? A. Yes, sir.

Q. How long were you in the hospital? A. A couple of hours, I'm not sure.

Q. Then you went back to the hospital? A. Then I went back.

Q. How long were you in the hospital after that? A. Five weeks.

Q. Five weeks? A. That is right.

Mr. Nitken: You may inquire, officer.

Cross-Examination of Mr. O'Brien by Officer Sousa

X-Q. You say that there was traffic in front of you? A. Yes.

X-Q. How far in front of you? A. The nearest one was the little truck—he was probably 25 to 30 feet.

X-Q. As you were going east you were on the right side of the white line or left? A. I might have been close to it. I don't see how I could possibly be over it.

X-Q. How do you explain the accident? The Chrysler was going toward you? A. That is right.

X-Q. When did you first see the Chrysler? A. Just before he hit me. You know you're not paying too much attention to that kind of traffic. I was watching my own side.

X-Q. Do you recollect making this statement to an officer at the Emerson Hospital, "I was travelling east on Route 2—

Mr. Nitken: Did he make it to you?

Officer Sousa: Yes, sir.

X-Q. (Cont'd) at an estimated speed of 25 to 30 miles per hour on the right lane. I didn't see any oncoming traffic or notice anything unusual? A. That is right.

X-Q. You first saw the Chrysler when he was in front of you? A. When he hit me.

X-Q. Was the Chrysler on your side of the road? A. He must have been. I don't see how he could have hit me otherwise.

X-Q. How did you manage to go 30 feet toward the fence—did you apply your brakes? A. That I wouldn't know.

X-Q. How heavy is your truck? A. Twenty-two thousand

pounds, empty, approximately. It may be a little more.

X-Q. Was it empty at that time? A. Yes, sir.

X-Q. You went 90 feet, as shown by the skid marks, toward the fence? A. Yes, sir.

X-Q. Were your brakes in working order? A. Oh, yes.

* * *

Examination of Mr. O'Brien by The Court

Q. Did you tell the officer you didn't see the oncoming traffic? A. I saw it just before it hit me, naturally.

Q. Did you tell the officer that you didn't see any oncoming traffic? A. That is right.

Q. You meant by that that you didn't see it until just before the contact? A. Yes, sir.

Q. How far were you before the point of contact when you did see this Chrysler? A. I don't know. Ten feet—might be 20 feet. I don't know.

Q. You did see the Chrysler before you came in contact with it? A. Just before it hit me.

Q. This is a straightaway there? A. Yes.

Q. There is nothing to obstruct your view? A. No.

Q. Have you any explanation as to why you didn't see the oncoming traffic? A. It is natural you don't pay too much attention.

Q. It is a straight-a-way there for quite a distance, open, nothing to obstruct your view; why was it you didn't see this oncoming traffic? A. I was paying attention to the traffic in front of me—not side of me.

Q. I don't see how you couldn't see this oncoming traffic—with this construction going on there oncoming traffic would be quite important? A. You would see it, naturally, wouldn't pay attention to it.

Mr. Nitken: What he means is that he saw it, but didn't pay any attention to it.

The Court: He tells the officer he didn't see it—didn't see any oncoming traffic—he told the officer

that at the Hospital—then he told the officer he saw it 10 to 20 feet away—and now he says he saw it in a general way. I don't know which statement to believe.

Q. When you saw this Chrysler, wherever it was you saw it, where was it in reference to the white line? A. Well, he was right there. (Indicating)

Q. Was it in your line or in his? A. Well, I might have been closer to the white line—I don't know what happened. He hit me on the left side.

Q. You say you saw the Chrysler? A. I saw it at the point of impact but not before. I didn't pay any attention to it.

Q. You would pay attention to a car you knew was going to be in collision with you? Do you mean you didn't see it in sufficient time to tell whether it was in your lane or in its own lane? A. That is right. I couldn't tell you that.

Q. Have you seen the pictures?

Mr. Nitken: I don't believe he has They were impounded.

(Photos shown defendant)

* * *

Re-Direct Examination of Mr. O'Brien by Atty. Nitken

Q. When you say you didn't pay any attention to any traffic coming toward you, will you clarify that? A. You see traffic, naturally, but you don't pay too much attention to it.

Q. You drive on the road all day long? A. Yes, sir.

Q. Every day? A. Yes.

Q. You don't pay any attention to traffic coming toward you unless you see your truck is in immediate danger? A. Yes, sir.

Q. You see cars whizzing by you? A. Yes.

* * *

Mr. Nitken: I would like to say, your Honor, that there is one witness who is not present, and he is the doctor who was driving the first car, the Chrysler—he is a most important witness.

Officer Sousa: The doctor is from the District of Columbia. He was in the hospital and operated on the same day. He isn't here—and we have no power to bring him back unless he wants to come back.

The Court: (To Mr. Nitken) Do you think he is going to help you?

Mr. Nitken: Yes, your Honor.

The Court: Making a claim for personal injuries?

Nitken: Yes.

The Court: Let's be practical.

FINDING: Who is on the wrong side of the road is the question. In view of all the testimony I am finding the defendant GUILTY, and impose a fine of $20. Appeal taken.

DEFENDANT'S EXHIBIT B

Saugus, Mass.
June 26, 1952

My name is Michael O'Brien, 69 years of age, a widower and I live at 86 Kenmere Rd., Medford, Mass. I have been employed on and off for the Utility Oil Co., 151 Highland Ave., Somerville for about 17 years. On Saturday, June 21, 1952 between 1:40 p.m. and 1:50 p.m. I was operating an asphalt distributor Mack tank truck on Route 2 in Acton. The weather was good. I was on my way home and traveling east. I had been to Shirley where I had distributed asphalt. I had been working in Shirley from about 7:30 until 1:00 p.m. As I remember I was going along on my own right side of the road at about 20 to 25 miles per hour, Joseph Mullaney, Laurel St., Somerville, my helper, was with me. Route 2 on the northerly side has a large open ditch with dirt piled outside the ditch for about 5 miles. This excavation has narrowed the road down to two lanes. Traffic in an easterly direction was heavy and I recall travelling behind a small panel body truck with a couple of boxes that were bouncing around. I paid no attention to traffic proceeding in a westerly direction. All I know is that while going along my truck was hit. I don't know how or where it was hit. I recall not too clearly that my truck ended up on the northerly side of Route 2 up against the fence. I recall that I had been thrown onto the cab truck floor. I recall a policeman prying open the truck door and I was taken to the Emerson hospital in Concord. I had a broken nose, fractured 5 ribs and injured both legs. Larry Gleason my boss came out to the Emerson hospital and took me home to Medford. My doctor, Dr. Baski of Medford, ordered me back into the hospital. On impact I was definitely knocked out.

I have read two Pages and they are true.

MICHAEL P. O'BRIEN

DEFENDANT'S EXHIBIT C.

M65. 50M—12-5-50-9817-1-'51—903,582 (b).

52-741 + 53-521
Deft Hobart's Exhibit D id.
12/6/55 DMW

Case No.....

The Commonwealth of Massachusetts

POLICE REPORT OF MOTOR VEHICLE ACCIDENT

(Required by General Laws, Chapter 90, Sections 26 and 29)

Sign and Mail this report without delay to **Registry of Motor Vehicles, 100 Nashua Street, Boston 14, Massachusetts**

Date of Accident June 21, 1952 Time 1:40 P.M. City or Town Concord Mass. On Route #2 St.

OPERATORS

	Names	Addresses	Sex	Age	Killed or Injured?	Operator's License	Years of Driving
A.	Michael J. O'Brien	30 Kenmere Rd. Medford Mass.	M	70	Inj.	57[redacted]	40
B.	Harold Hobart	5110 Manning Pl. N.W. Wash. D.C.	M		Inj.	[redacted]	25
C.	Robert L. Whitney	Main St. ASHBY	M	24	Inj.	136[redacted]	[redacted]

OWNERS

	Names	Addresses
A.	Robin C. Donovan	151 Highland Ave. Somerville
B.	Same	
C.	Same	

PASSENGERS KILLED OR INJURED

	Names	Addresses	Killed or Injured?	Sex	Age
1.	Car A Joseph Mullaney	17 Laurel Terr. Somerville	Inj.	M	[redacted]
2.	Car B Mrs. HaroldHobart	Same	Inj.	F	[redacted]
3.	Car C Mrs. Lillian Whitney	Same	Inj.	F	[redacted]
4.					

OPERATORS Check X (at left) what doing:

A.	Speed too fast X	On wrong side of road	Cutting left corner	Backing	Cutting in	Hit and run	Had been drinking		
B.	Speed too fast	On wrong side of road	Cutting left corner	Backing	Cutting in	Hit and run	Had been drinking		
C.	Speed too fast	On wrong side of road	Cutting left corner	Backing	Cutting in	Hit and run	Had been drinking		

PEDESTRIANS

Names	Addresses	Killed or Injured?	Sex	Age
None				

Check X (at left) What Doing and Condition:

Had physical defect	At work in roadway		Standing in safety zone		From in front or behind vehicle
Crossing diagonally	Playing in street	On sidewalk	Inattention		Waiting for, boarding, leaving Street Car
Crossing between intersections		Just stepped off sidewalk	Confused by traffic		Waiting for, boarding, leaving Bus
Crossing against red light		Hitching ride on vehicle	Had been drinking		Crossing during pedestrian interval

TYPE OF ACCIDENT AND VEHICLES Check X (at left) which involved:

2 Automobile | Pedestrian | Fixed object | Overturned | Street Car | Train | Sled | Bicycle | Horse-drawn vehicle | Animal | Motorcycle | Scooter or skates

	Registration Number	Registration State	Make	Type	Condition of Brakes	Condition of Lights	Condition of Other equipment
1.	A 35465	Mass	Mack	Truck	Good		
2.	5765	D.C.	Chrysler	Sedan	not checked		
3.	591232	Mass.	Ford	Sedan	not checked		

CONDITIONS Check X (at left) item that applies:

DEFENDANT'S EXHIBIT D id. 567

PASSENGERS KILLED OR INJURED

	Names	Addresses	Injured?	Sex	Age
1.	Car A Joseph Mullaney	17 Laurel Terr. Somerville	Inj.	M	[redacted]
2.	Car B Mrs. HaroldHobart	Same	Inj.	F	[redacted]
3.	Car C Mrs. Lillian Whitney	Same	Inj.	F	[redacted]
4.					

OPERATORS Check X (at left) what doing:

A.	Speed too fast X	On wrong side of road	Cutting left corner	Backing	Cutting in	Hit and run	Had been drinking		
B.	Speed too fast	On wrong side of road	Cutting left corner	Backing	Cutting in	Hit and run	Had been drinking		
C.	Speed too fast	On wrong side of road	Cutting left corner	Backing	Cutting in	Hit and run	Had been drinking		

PEDESTRIANS

Names	Addresses	Killed or Injured?	Sex	Age
None				

Check X (at left) What Doing and Condition:

Had physical defect	At work in roadway		Standing in safety zone		From in front or behind vehicle
Crossing diagonally	Playing in street	On sidewalk	Inattention		Waiting for, boarding, leaving Street Car
Crossing between intersections		Just stepped off sidewalk	Confused by traffic		Waiting for, boarding, leaving Bus
Crossing against red light		Hitching ride on vehicle	Had been drinking		Crossing during pedestrian interval

TYPE OF ACCIDENT AND VEHICLES Check X (at left) which involved:

2 Automobile | Pedestrian | Fixed object | Overturned | Street Car | Train | Sled | Bicycle | Horse-drawn vehicle | Animal | Motorcycle | Scooter or skates

	Registration Number	Registration State	Make	Type	Condition of Brakes	Condition of Lights	Condition of Other equipment
1.	A 35465	Mass	Mack	Truck	Good		
2.	5765	D.C.	Chrysler	Sedan	not checked		
3.	591232	Mass.	Ford	Sedan	not checked		

CONDITIONS Check X (at left) item that applies:

1. Type of District: Business X Residential, thick thin Country Parkway
2. Road at Location: X Straight Curve Hill top Underpass Bridge Electric R. R. Steam R. R.
3. Means of Traffic Control: X None Beacons STOP signs STOP and GO signals Officer
4. Atmospheric Conditions: X Clear Cloudy Fog Mist Rain Snow
5. Light Conditions: X Daylight Dusk Dawn Dark Driving on low beam on high beam
6. Road Surface: X Dry Wet Snow Ice
7. Condition of Roadway: X Smooth Rutted Car tracks
8. Obstructions in the Roadway: X None Traffic control devices Standing vehicles Moving vehicles
9. Obstructions to View: X None Trees Embankments Buildings Standing street cars or trains Standing vehicles

Date signed 6-23-52

Title of official making this report Patrolman M.S.P.

Signature Americo J. Sousa A-3

Names	WITNESSES	Addresses

1. NONE
2.
3. [redacted]

Make a brief statement covering points of importance not mentioned before in this report.

EXACT LOCATION: ON RT.2, CONCORD, 60 feet East of theACTON CONCORD Line

GIST: Car A travelling East on RT.2 atan Est. speed of 25-30 mph Cars B&C trav. West on RT.2 at an EST. speed of 30mph, and were approaching construction on the North side of the road. Construction covered right lane of road (10FT.). Leaving 2 lanes open (20FT.). Car C was following car B. Car A came over the broken white line between the two lanes and struck the left front end of car B with its left front. The impact drove car A and B diagonalloy across to the notheast side of the raad. Car A continued on across the road pushing car B with its left front end and struck the front end of car C and pushed it across road and into fence. Car A came to stop against the safety fence on the north side of road, heading north. Car B came to stop with rear of car against fence, heading south. Car C came to stop with front end on fence, heading north. The point of impact was to the right of the center of the road in the west bound lane. Car A skidded 90 ft/ after impact, pushing cars B & C ahead of it. (Car A was a tar truck, weighing about 22,000 lbs, empty.) All Injurred parties were taken to the EMERSON HOSP. - Treated by DR. W. FORBES, of CONCORD and later released. (OPER. & PASS. in car B refused treatment at the EMERSON and requested to be taken to the MASS. GEN. HOSP. Request was grant ed and they were admitted to same.).

STATEMENTS of OPER:

OPER. A-- I was travelling EAST on RT.2 at an EST. speed of 25-30 mph on the right lane . I did not see any on coming traffic, or notice anything unusal.

OPER. B-- I was travelling WEST on RT.2 at an EST. speed of 30 mph The first thing I saw,the Truck coming for my car .It seem to be coming at an angle and on my part of the road. I applied my brakes and then he hit me. There was no place for me to turn, or time in

approaching construction on the North side of the road. Construction covered right lane of road (10FT.). Leaving 2 lanes open (20FT.). Car C was following car B. Car A came over the broken white line between the two lanes and struck the left front end of car B with its left front. The impact drove car A and B diagonalloy across to the notheast side of the raad. Car A continued on across the road pushing car B with its left front end and struck the front end of car C and pushed it across road and into fence. Car A came to stop against the safety fence on the north side of road, heading north. Car B came to stop with rear of car against fence, heading south. Car C came to stop with front end on fence, heading north. The point of impact was to the right of the center of the road in the west bound lane. Car A skidded 90 ft/ after impact, pushing cars B & C ahead of it. (Car A was a tar truck, weighing about 22,000 lbs, empty.) All Injurred parties were taken to the EMERSON HOSP. - Treated by DR. W. FORBES, of CONCORD and later released. (OPER. & PASS. in car B refused treatment at the EMERSON and requested to be taken to the MASS. GEN. HOSP. Request was grant ed and they were admitted to same.).

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OPER. B-- I was travelling WEST on RT.2 at an EST. speed of 30 mph The first thing I saw,the Truck coming for my car .It seem to be coming at an angle and on my part of the road. I applied my brakes and then he hit me. There was no place for me to turn, or time in

which to do so.

OPER. C-- I was travelling WEST on RT. 2 at an EST. speed of30mph the car in front of me was approaching the construction and was slowing down. The car in front ofme pulled out so as to get by the Const. I notice this truck coming EAST was over the broken white line about 2 or 3 feet. The car in front applied his brakes and so did I. The truck hit the car in front of me forcing him back and to the right side of the road and the truck curved over to the right side of the road too. As it did so he hit my left front turning me around, and up against the state fence.

INJURIES: OPER: CAR A: -- Two broken ribs,bruised knees,hands,&elbows& nose.
PASS. --Bruised right knee, Bump on head.
OPER: CAR B: -- Bruised chest, stomach, multiple concussions, lacertio
PASS. --Treated for shock, and Laceration.
OPER : CAR C :--Laceration of the right knee,shock,
PASS. --LAC. of right knee,LAC. of the nose,bruised forehead,shock, LAC. of the right supre orbital.

Names **WITNESSES** *Addresses*

1. .....

2. .....

3. .....

Make a brief statement covering points of importance not mentioned before in this report.

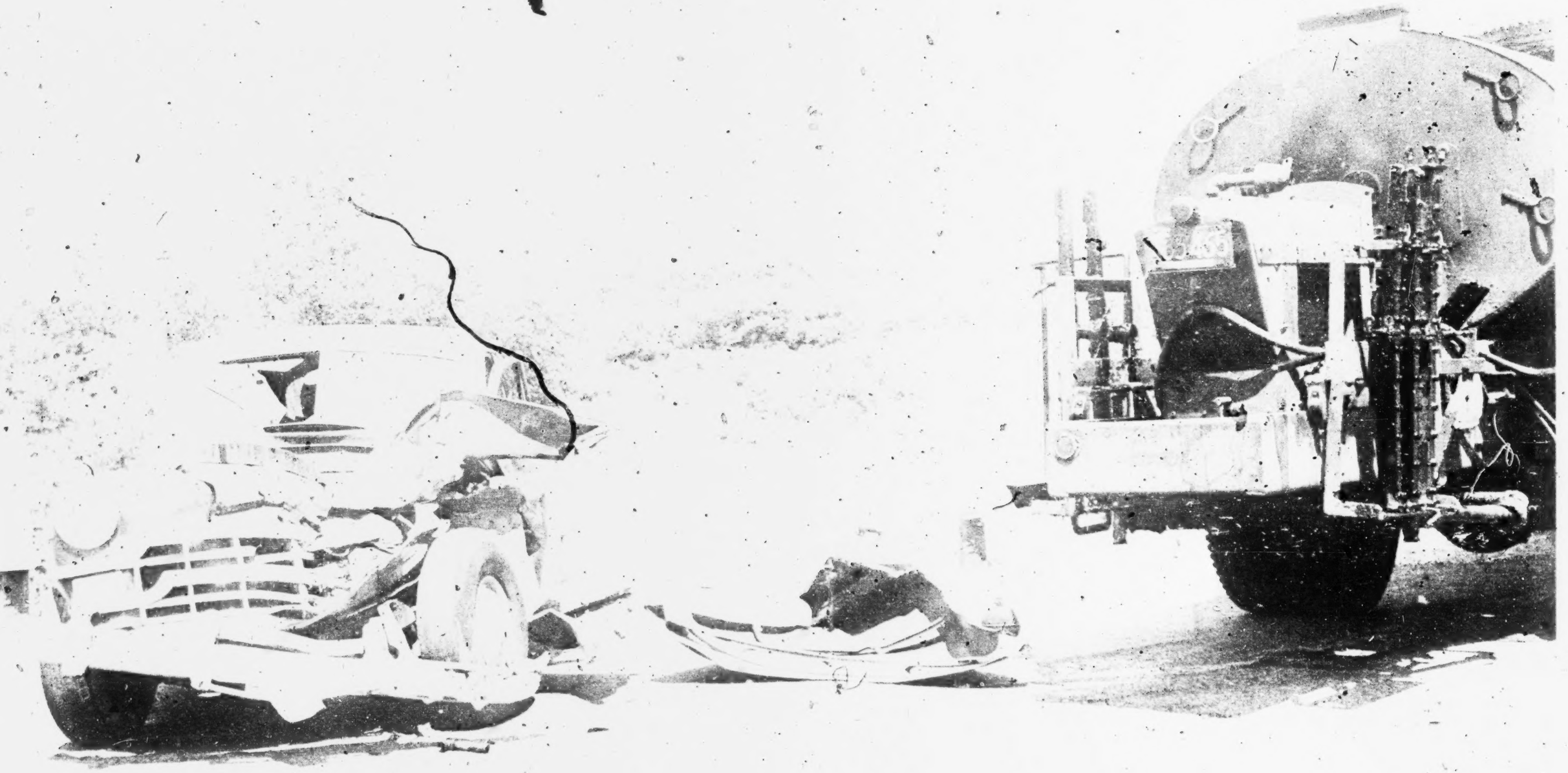
[redacted]

DAMAGE TO CARS:
CAR A: Left Fender - headlight and bumper torn off, grille damaged oil pan punctured- towed off road by FROST'S wrecker.
CAR B: Left front fender, grille, , radiator, springs, bumper, hood, left door, windshield,-- car is believed to be a total wrecker.
CAR C: Left front fender, bumper headlight, hood.
OPINION: It is the opinion of the investigating officer that the operator of car A was at fault because he did not operate his vehicle to the right of the middle of the traveled part of such way, so that the vehicles may pass without interference.

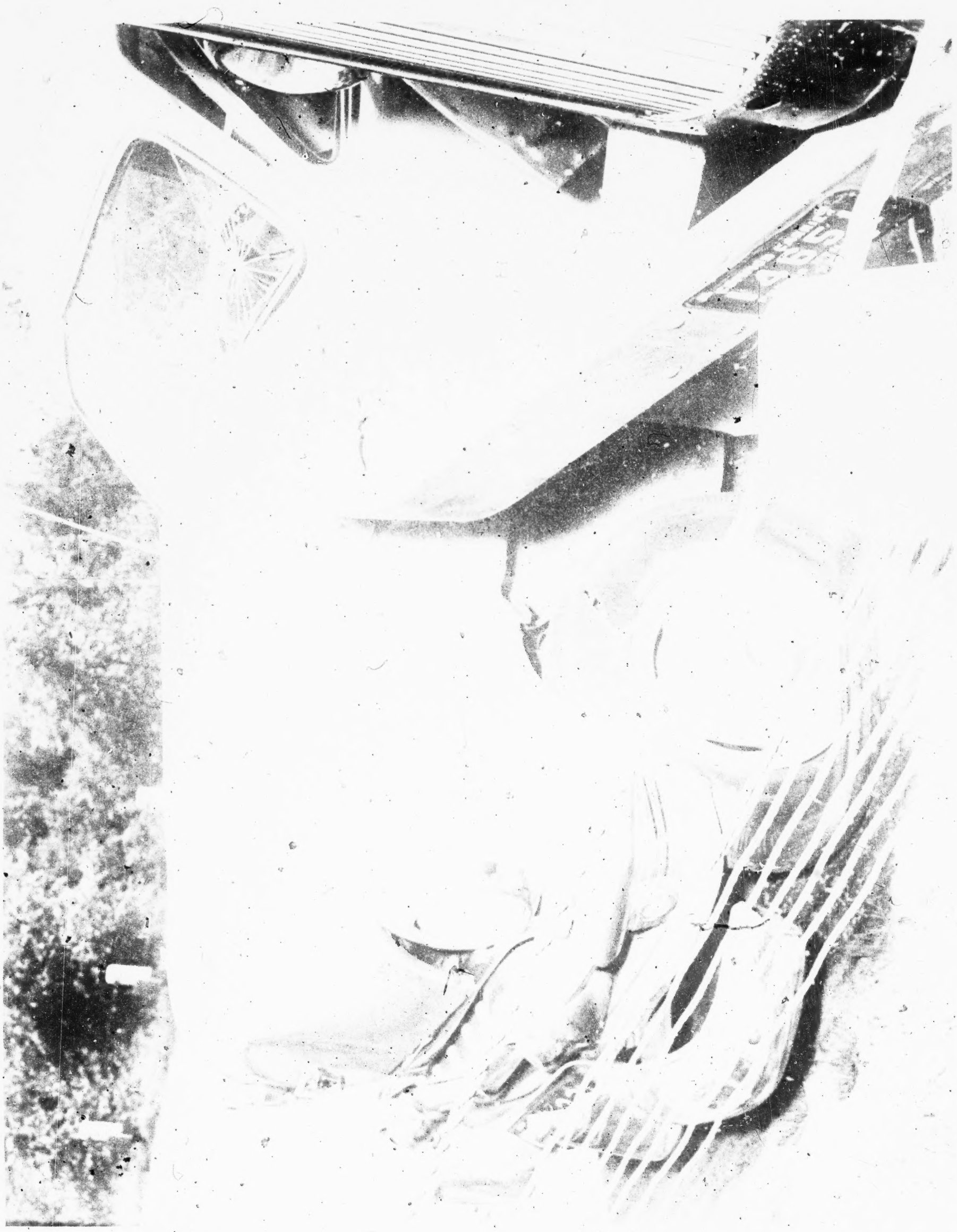
RECOMMENDATION:
OPERATOR of car A to be SUMMONS for (Failing to keep to the right of the middle of the traveled part of such way.)

windshield,-- car is believed to be a total wrecker.
CAR C: Left front fender, bumper headlight, hood.
OPINION: It is the opinion of the investigating officer that the operator of car A was at fault because he did not operate his vehicle to the right of the middle of the traveled part of such way, so that the vehicles may pass without interference.

RECOMMENDATION:
OPERATOR of car A to be SUMMONS for (Failing to keep to the right of the middle of the traveled part of such way.)



DEFENDANT'S EXHIBIT E 1.



DEFENDANT'S EXHIBIT D-2

DEFENDANT'S EXHIBIT E-6

DEFENDANT'S EXHIBIT E-8.

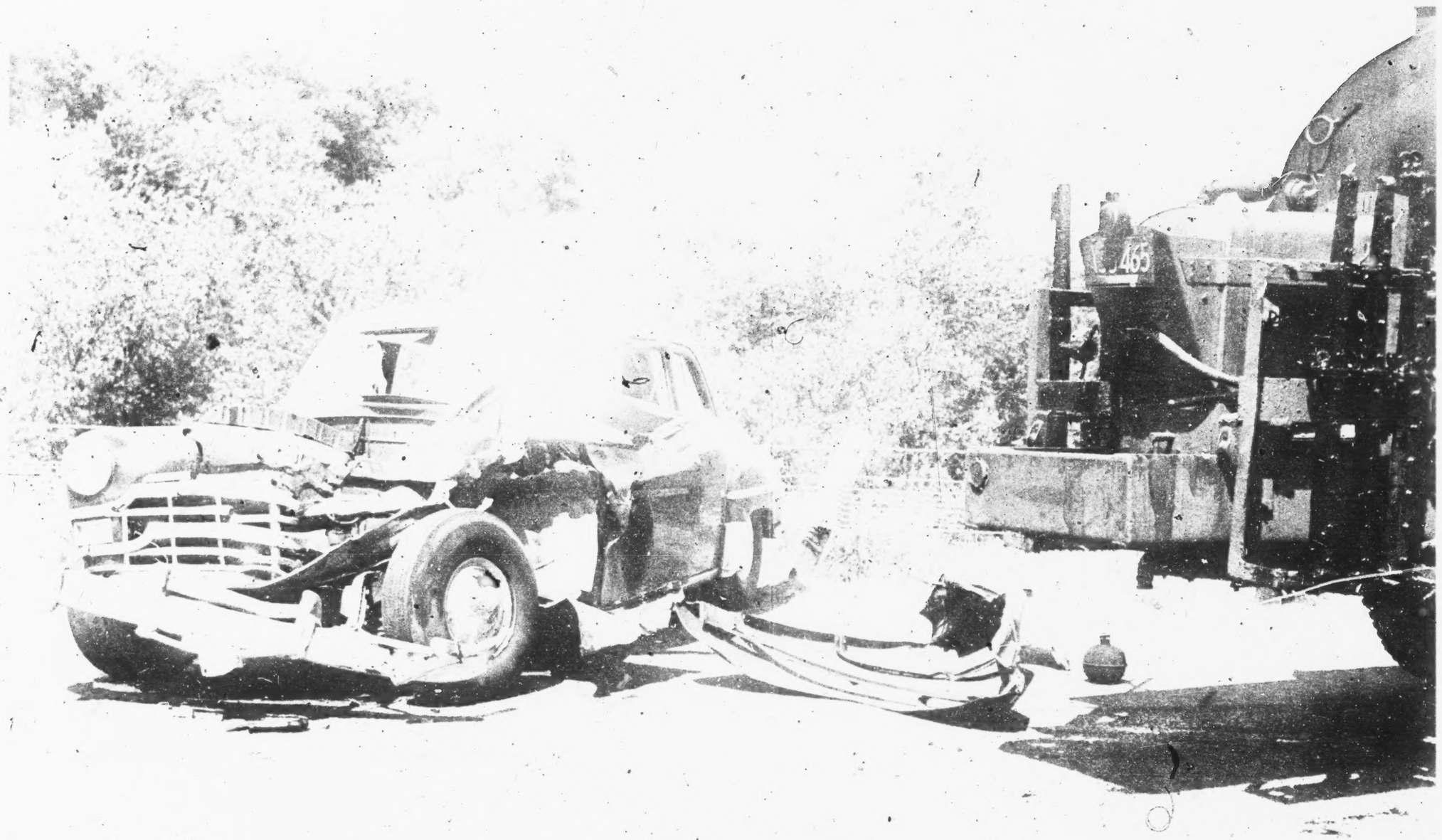
DEFENDANT'S EXHIBIT E-9

DEFENDANT'S EXHIBIT E-16

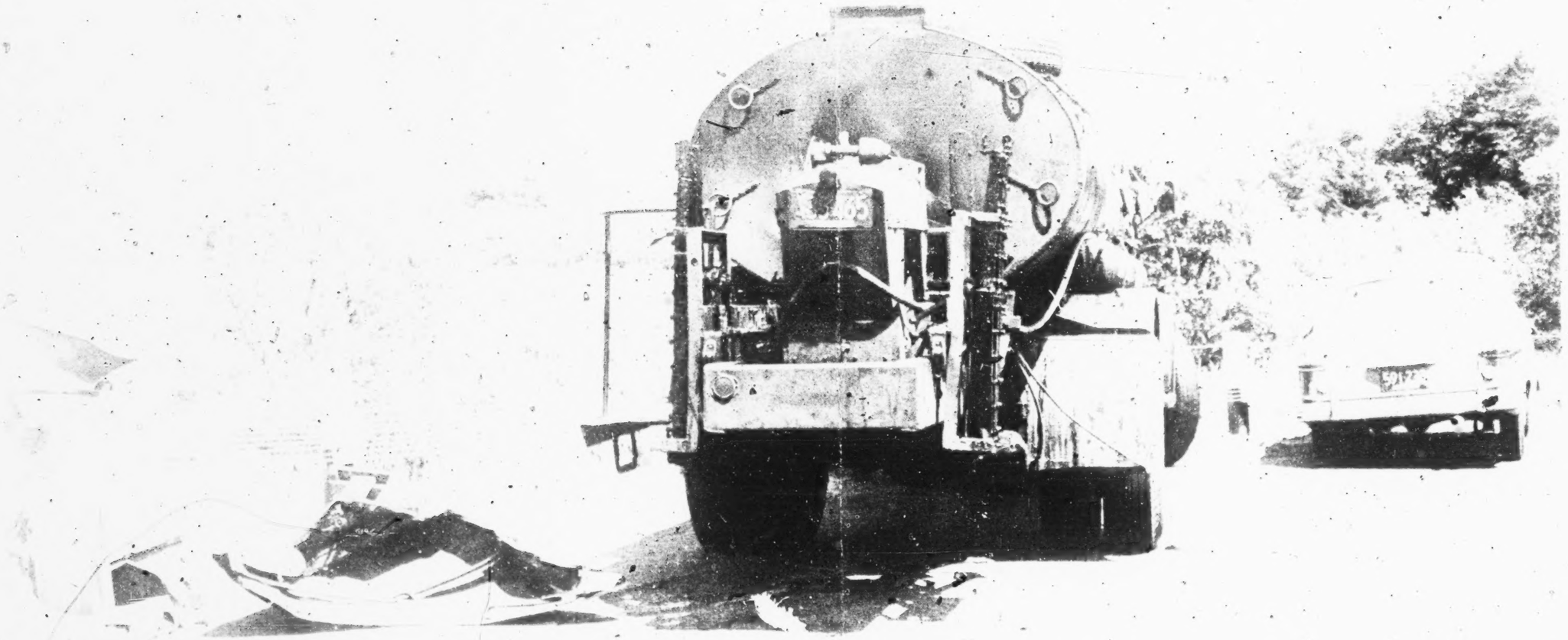
DEFENDANT'S EXHIBIT E 12

DEFENDANT'S EXHIBIT E 13

DEFENDANT'S EXHIBIT E-11



DEFENDANT'S EXHIBIT [illegible]



DEFENDANT'S EXHIBIT E 16.

Note

Following pages were blank:

566	582	598
570	584	600
572	588	602
574	590	
576	592	
578	594	
580	596	

DEFENDANT'S EXHIBIT F

No. F-4978

[SEAL]

The Commonwealth of Massachusetts

Department of Public Works
Concord
Acton
PERMIT

Subject to all of the terms, conditions and restrictions printed or written below, and on the reverse side hereof, permission is hereby granted to
TOWN OF CONCORD (Sewer and Water Department) to open the State highway in the towns of Concord and Acton, known as Route 2, for the purpose of cleaning and relining the existing water main on the northerly side of the road between stations 0 and 27+01 in Concord and between stations 0 and 99+46 in Acton.

Attention is called to the clauses on the back of this permit relating to the laying of pipes, etc.

Necessary barriers and signs shall be installed by the Grantee. When a snow or ice condition exists during the progress of the work, the Grantee shall keep the highway well sanded to a point not less than 200 feet beyond the limits of the barriers and signs.

☞ (See other side for additional conditions)

No work shall be done under this permit until the Grantee shall have communicated with and received instructions from the District Highway Engineer of the Department of Public Works, at 130 Third Street, Cambridge. Tel. Kirkland 7-8127.

This permit shall be void unless the work herein contem-

plated shall have been completed before January 1, 1953.

Dated at Boston this twenty-fifth day of April, 1952.

Department of Public Works,
By MARY E. McMORROW
Secretary MCB

Copy to F. D. S.
A true copy Attest

MARY E. McMURROW
Secretary

CONDITIONS RELATING PARTICULARLY TO PERMITS FOR THE LAYING OF PIPES, CONDUITS, ETC.

After any pipes, conduits, drains or other underground structures are laid, or any excavation is made in the roadway, the trenches or openings shall be properly back-filled with suitable material, the back-filling shall be thoroughly tamped, and the surface of the road over said structures shall be left even with the adjoining ground. If the work is done in cold weather no frozen material shall be used for back-filling.

Wherever the hardened surface of the roadway, gutters, or any part of the surface of the highway is disturbed it shall be replaced in as good condition as before it was disturbed, and if new materials are required they shall correspond with those already in place on the road.

Where service pipes are to cross the highway the connections shall be made without disturbing the hardened surface of the roadway, by driving the pipes under the roadway, or the service pipes shall be carried under and across the road in a larger pipe, unless otherwise ordered by the Engineer.

The Grantee shall maintain the surface of the roadway over said structures as long as the Department may deem necessary, until all signs of the trenches shall have been eliminated.

Conditions Relating Particularly to Permits for the Erection of Poles, Wires, and Overhead Structures, and the Cutting and Trimming of Trees

In the erection of pole lines, unless otherwise herein provided, no trees located within the limits of the State highway shall be cut or trimmed. No guy wires shall be attached to trees without a special permit from the Department, and in no event shall they be so attached as to girdle the trees or in any way interfere with their growth. The wires shall be so protected at all times and places that they shall not interfere with or injure the trees either inside or outside the location of the highway.

Where the cutting or trimming of trees is authorized by this permit, only such cutting and trimming shall be done as may be designated by the Engineer.

In the construction or reconstruction of pole lines no guy wires shall be erected nearer to the surface of the ground than six feet; provided, however, that the owners of such lines may maintain such guy wires at a lower elevation than six feet from the ground until such time as the Department shall notify them to remove said wires or to raise them to the elevation first stated.

In order to protect the trees through which any wires may pass, said wires shall be insulated and such other tree guards used as may be directed by the Engineer.

Where high tension wires are erected under this permit, they shall be so located that, under conditions of maximum severity as regards a coating of ice or snow, there shall be a space of at least eight feet between such high tension wires and other wires.

The Grantee shall, within sixty days from the date of completion of the work, file in the office of the Department a plan showing the location of each pole erected in accordance with the permit, said plan to be of such size and in such form as the Department may direct.

GENERAL AND ADDITIONAL CONDITIONS

Whenever the word "Department" is used herein it shall mean the Department of Public Works of the Commonwealth of Massachusetts.

Whenever the word "Engineer" is used herein it shall mean the District Highway Engineer or other authorized representative of the Department.

Wherever the word "Grantee" is used herein it shall mean the person or persons, corporation or municipality to whom this permit is granted, or their legal representatives.

During the progress of the work all structures under ground and above ground shall be properly protected from damage or injury; such barriers shall be erected and maintained as may be necessary for the protection of the traveling public; the same shall be properly lighted at night; and the Grantee shall be responsible for all damages to persons or property due to or resulting from any work done under this permit.

Except as herein authorized, no excavation shall be made or obstacle placed within the limits of the State highways in such a manner as to interfere unnecessarily with the travel over said road.

If any grading or sidewalk work done under this permit interferes with the drainage of the State highway in any way, such catch basins and outlets shall be constructed as may be necessary, in the opinion of the Engineer, to take proper care of said drainage.

Wherever the hardened surface of the roadway is disturbed and the Engineer may consider it necessary or advisable to do so, said surface will be restored by the employees of the Department, at such time as the Department may direct, and the expense thereof shall be borne by the Grantee, who shall purchase and deliver on the road the materials necessary for said work if and when directed by

the Engineer. All payments to materialmen and to laborers, inspectors, etc., employed by the Department for or on account of the work herein contemplated shall be made by said Grantee forthwith on the receipt of written orders, pay rolls, or vouchers approved by the Department.

☞ *If the Grantee does any work contrary to the orders of the Engineer, and, after due notice, fails to correct such work or to remove structures or materials ordered to be removed, or fails to complete within the specified time the work authorized by this permit, the Department may, with or without notice, correct or complete such work in whole or in part, or remove such structures or materials, and the Grantee shall reimburse the Commonwealth for any expense incurred in correcting and/or completing the work or removing the structures or materials.*

All of the work herein contemplated shall be done under the supervision and to the satisfaction of the Department of Public Works, and the entire expense thereof shall be borne by the Grantee.

On the completion of the work herein contemplated all rubbish and debris shall be removed and the roadway and roadsides shall be left neat and presentable and satisfactory to the Engineer.

The Department hereby reserves the right to order the change of location or the removal of any structure or structures authorized by this permit at any time, said change or removal to be made by and at the expense of the Grantee or its/their successors or assigns.

This permit may be modified or revoked at any time by the Department without rendering said Department or the Commonwealth of Massachusetts liable in any way.

The Grantee shall pay the salary, subsistence and traveling expenses of any inspector appointed by the Department to supervise the work herein contemplated.

All of the above conditions shall be applicable to the

work herein authorized, unless the same are inconsistent with the conditions on the face of the permit, in which case the conditions written or printed on the face of the permit shall apply.

The acceptance of this permit or the doing of any work thereunder shall constitute an agreement by the Grantee to comply with all of the conditions and restrictions printed or written herein.

DEFENDANT'S EXHIBIT C

1 id.

2 id.

3.

4.

5 id.

6 id.

7 id.

8 id.

9 id.

10 id.

11 id.

12 id.

PLAINTIFF'S EXHIBIT NO. 2.

EMERSON HOSPITAL
26 June 1952

re: Michael O'Brien
Hospital OPD #25706

Mr. Michael O'Brien
86 Kenmore Road
Medford, Massachusetts

Dear Mr. O'Brien:

On June 21 you were informed at this hospital, after examination and treatment of your injuries, that the X-rays showed no fractures. This report was made after examination of the wet films.

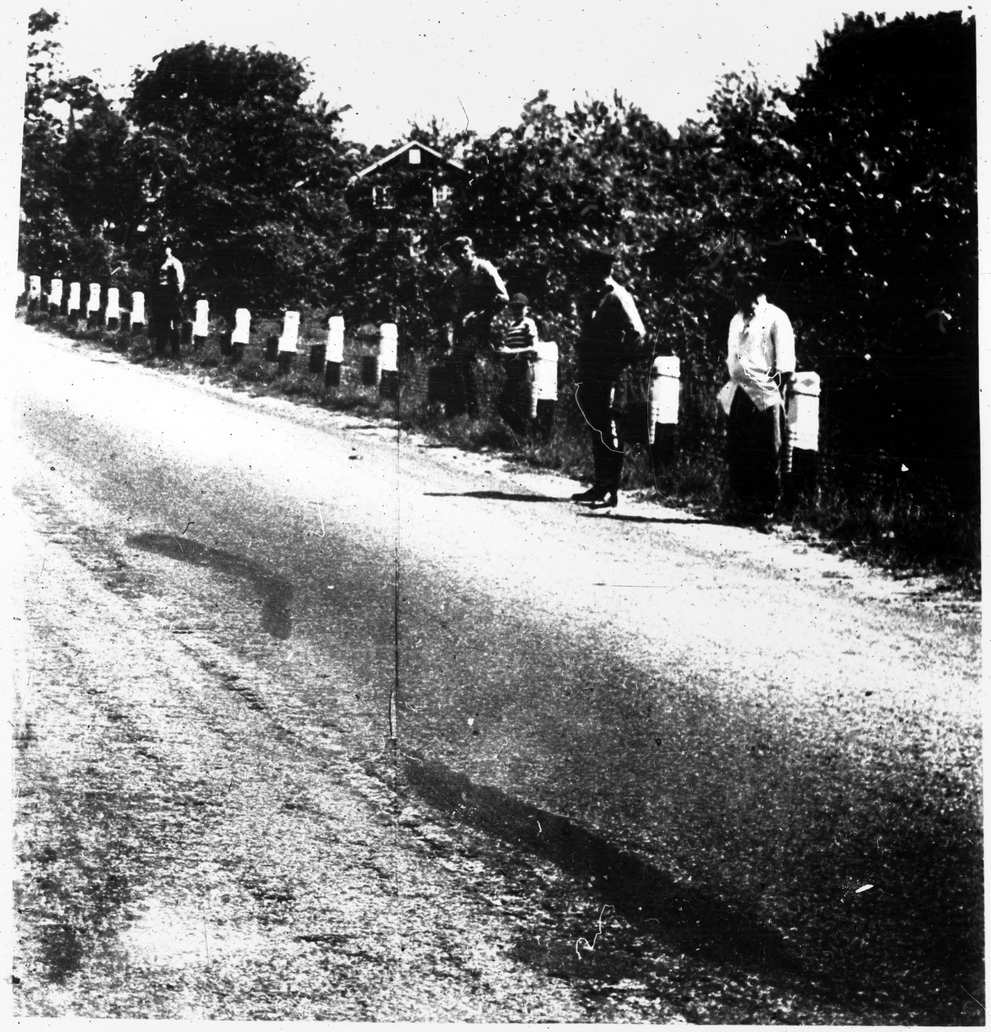
Re-examination of the films after they had dried showed a transverse fracture of the left fifth rib in the mid-axillary line. There was no displacement of the fragment. The treatment which we instituted it not in any way altered by the report. I do think, however, that you should inform your personal physician of the later finding.

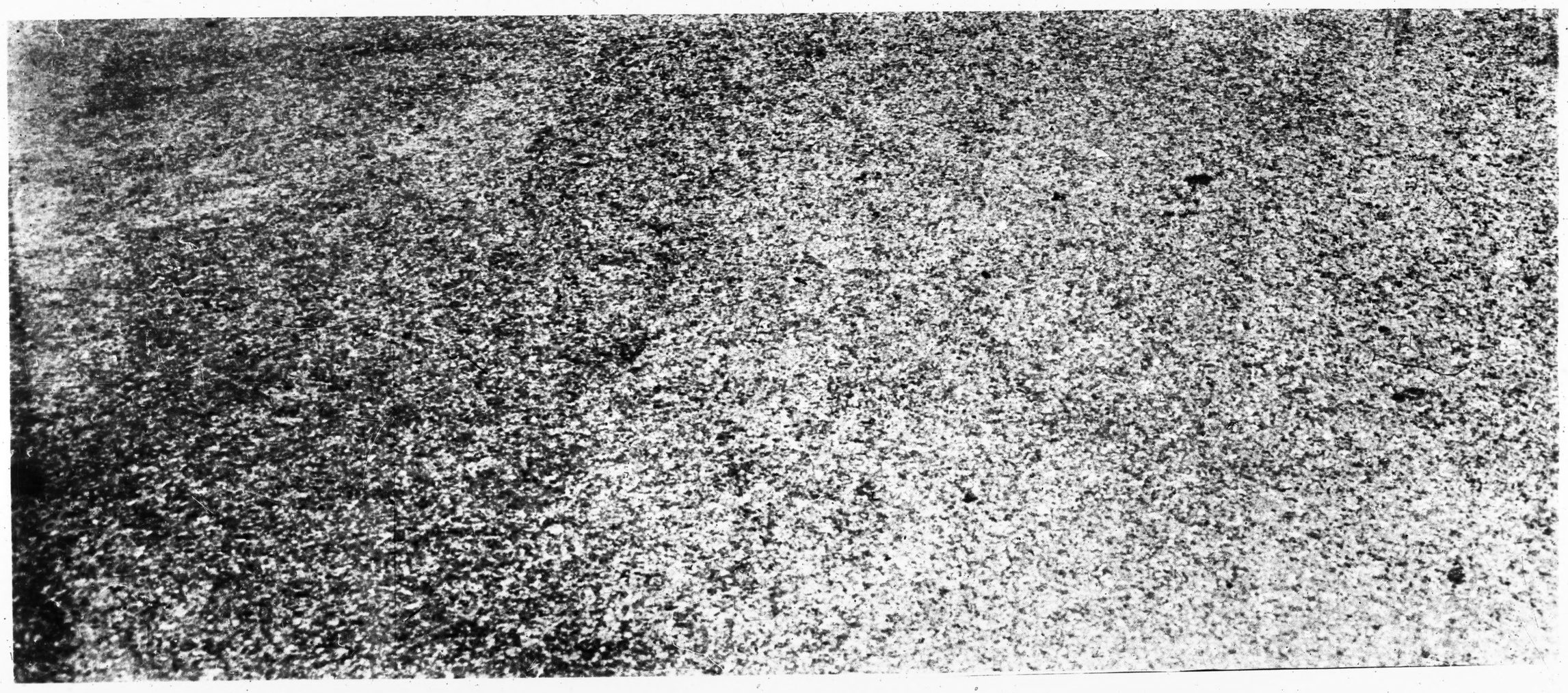
Both elbows and both knees, as you know, sustained no bony injury.

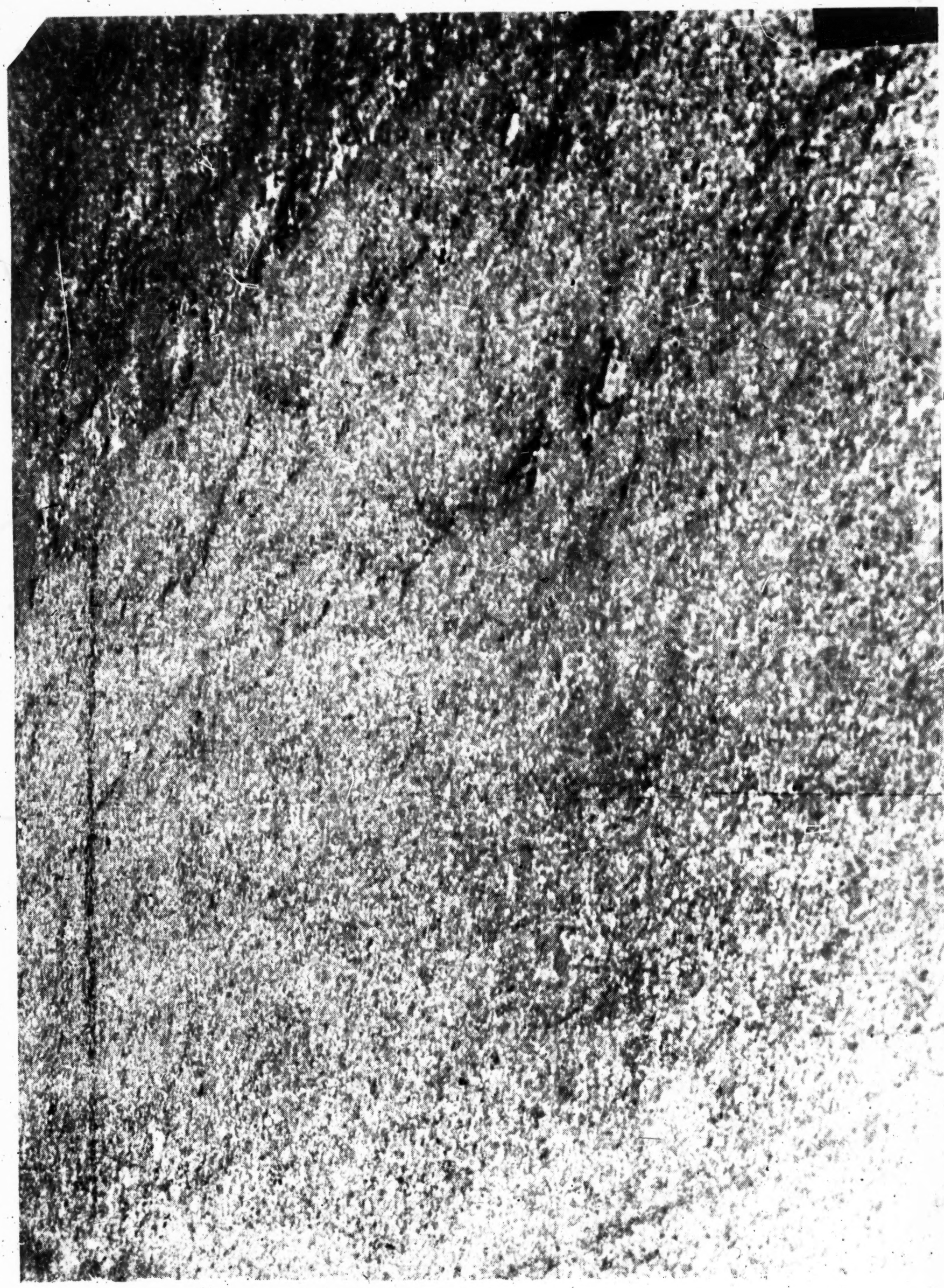
Yours very truly,
(s) WILFRED W. FORBES, M.D.
WILFRED W. FORBES, M.D.

WWF/WM

PLAINTIFF'S EXHIBIT NO. 9.







IN THE

Supreme Court of the United States

..... Term, ...

No. 5172

HAROLD HOBART,
Petitioner,

v.

MICHAEL P. O'BRIEN,
Respondent.

No. 5173

HAROLD M. HOBART,
Petitioner,

v.

JOHN G. DONOVAN ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FORD E. YOUNG, JR.
1125 Warner Building
Washington 4, D. C.

JOSIAH LYMAN
1125 Warner Building
Washington 4, D. C.
Attorneys for Petitioner.

TABLES OF CASES CITED

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Louisiana & Arkansas Ry. Co. v. Johnson, 214 F 2d 280 ..... 12, 16

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OTHER AUTHORITIES

American Jurisprudence, Vol. 3, Under Title "Appeal & Error" 15

American Jurisprudence, Vol. 38, Under Title "Negligence" 30

American Jurisprudence, Vol. 53, Under Title "Trial" ..... 15 & 16

Annotated Laws of Mass., Chap. 89, Sec. 4 "Failing to keep to the right when view is obstructed" ..... 9.

Babbitt on "Motor Vehicle Law", 4th Ed., Chapter xxxviii, "Automobile Negligence" 31

Corpus Juris, Vol. 64, Under Title "Trial" 15, 17

In The

Supreme Court of the United States

..... Term, ...

No. 5172

Harold Hobart,
Petitioner,

v.

Michael P. O'Brien,
Respondent,

No. 5173

Harold M. Hobart,
Petitioner,

v.

John G. Donovan et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTION

The jurisdiction of this Honorable Court to heat and determine this case is based upon Title 28, Section 1254 (1) of the U. S. Code.

STATEMENT OF THE MATTER INVOLVED

This petition is based upon discrepancies which occurred in the trial of an motor vehicle accident case in

the United States District Court for the District of Massachusetts during the period of November 29, 1955 through December 9, 1955, the verdict of the jury having been returned early on the morning of December 10, 1955. Said automobile accident occurred between 1:30 and 2 o'clock on the afternoon of June 21, 1952. There were companionate cases, one of which was brought by Dr. Harold M. Hobart of Washington, D. C., against John G. Donovan and Michael P. O'Brien of Massachusetts and the other by Michael P. O'Brien against Dr. Hobart. This petition is filed on behalf of Dr. Hobart. On the day and at the time in question Dr. Hobart was driving a Chrysler passenger automobile in a westerly direction on Route 2 away from Boston, Massachusetts. Michael P. O'Brien was driving an oil truck in an easterly direction on the same highway. Said truck was owned by John G. Donovan who was doing business in the name of Utility Oil Company. Mr. O'Brien was an employee of Mr. Donovan. The highway in question was normally a three lane road with the lanes marked by white lines. As Dr. Hobart passed through the town of Concord on this road and approached the town line between Concord and Acton, the lane in which he was traveling was obstructed by holes, piles of dirt, barricades and warning signs. These obstructions began some 1000 feet east of the scene of the accident. By reason of these obstructions, the defendant was obliged, as were drivers of other westbound vehicles, to drive in the middle lane some distance before reaching the place in the roadway where the accident in question occurred.

Mr. O'Brien was driving the truck owned by Mr. Donovan in an easterly direction on the highway in question prior to this accident. The collision in question occurred while Dr. Hobart was traveling in the center lane and was passing part of the construction work which blocked off the use of the northerly lane. The Exhibits which

constitute pages 565, 571, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599 and 601 of the "Consolidated Record Appendix to the Briefs for the appellants" in the United States Circuit Court of Appeals for the First Circuit, said exhibits being in Volume 2 of said Consolidated Record Appendix show how the truck driven by Mr. O'Brien pushed the passenger vehicle driven by Dr. Hobart across the roadway and against a guard rail which ran parallel to the northernmost edge of the highway. In doing so the truck driven by Mr. O'Brien also collided with a passenger vehicle driven by one Robert Whitney, which said automobile was proceeding in a westerly direction in back of the vehicle driven by Dr. Hobart. All three vehicles were severely damaged. Dr. Hobart and Mr. O'Brien suffered personal injuries. The jury in the United States District Court for the District of Massachusetts returned a verdict for Mr. O'Brien against Dr. Hobart in the sum of SIXTY ONE THOUSAND DOLLARS ($61,000.00) and the Clerk of the United States District Court for the Eastern District of Massachusetts added interest to the judgment from the time of the accident until the entry of the verdict. Upon consideration of the motions for Judgment N.O.V. and for a New Trial, the Judge of the court below ordered a remittitur in the sum of THIRTEEN THOUSAND DOLLARS ($13,000.00) and counsel for Mr. O'Brien filed a remittitur in that amount. The United States Court of Appeals for the First Circuit affirmed the judgment of the court below.

During the course of the trial in the United States District Court for the District of Massachusetts counsel for Mr. O'Brien, Michael Prendergast, Esquire, made derogatory references to Thomas H. Mahony, Esquire, one of the attorneys for Dr. Hobart. Said remarks during the introduction of evidence at the trial of the case are as follows:

First, as set forth on pages 99 and 100 of the Consolidated Record Appendix to Briefs for Appellants in the United States Court of Appeals for the First Circuit, same being in Volume 1:

> "Mr. Mahony: May I take a look at it?
> Mr. Prendergast: Oh, sure (handing)—but you won't tell us the truth.
> Mr. Mahony: Well, I do object to that.
> The Court: All right counsel doesn't mean anything by that.
> Mr. Prendergast: No, no, no."

Second, as found on page 201 of said Consolidated Record Appendix:

> "Q. So that the only use of the car in 1953 was to drive you over to a filling station where you hung around all day?
> A. That's right.
> Mr. Prendergast: He didn't say 'all day'.
> "A. (Continuing) Oh, not all day.
> Mr. Prendergast: You have to watch these fellows, Mr. O'Brien. They'll sneak in words you never were dreaming of."

Third, as found on page 275 of the Consolidated Record Appendix:

> "Mr. Mahoney: I don't think Mr. Mahoney's status is a fact, but I am in now.
> Mr. Prendergast: You are in up to your neck."

The references to Mr. Mahony by Mr. Prendergast in closing argument are as follows:

> "No matter what my friend Mr. Mahony may say, and I am sure if Mr. Mahony ever gets to the age Michael O'Brien is at and loses part of his lung, he will be the one big fellow to cry about it, and don't forget it, and he will regret the day he stood up in front of 11 people and attempted to belittle the situation. (Consolidated Record Appendix page 520).
> Just as I submit, if he (meaning Mr. Malony) was trying to be fair and square, you people know there

are thousands of doctors in Boston." (Consolidated Record Appendix page 523).

He (meaning Mr. Mahony) twists the facts again and he says for years before this accident he (meaning Mr. O'Brien) was only working part time." (Consolidated Record Appendix page 525).

There were other derogatory remarks by Mr. Prendergast regarding Mr. Mahony during the trial which were pointed out in the "Brief in Support of Motions For a New Trial and For Judgment NOV" in the United States District Court For the District of Massachusetts but were not pointed out to the United States Court of Appeals for The First Circuit. Counsel for the Petitioner, Hobart, believes that it would be inappropriate to rely upon any references not specifically pointed out in the Brief in the United States Court of Appeals for the First Circuit, and, therefore, relies entirely upon the foregoing with regard to misconduct of counsel and failure of the trial Judge to properly admonish counsel and instruct the jury regarding same.

During the course of his argument Mr. Prendergast made the following reference to alleged testimony of the witness John H. Robinson, who appeared as a witness in his capacity as the Superintendent of the Water and Sewer Department for the town of Concord, Massachusetts:

"I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened." (Consolidated Record Appendix, page 518).

Counsel for Dr. Hobart have searched the transcript to find out whether or not any evidence was introduced from the witness Robinson which could possibly furnish

the basis of such an argument. It is believed that Mr. Prendergast must have been referring to the following part of the testimony of the witness Robinson and the arguments regarding admissibility in connection therewith as set forth in the Consolidated Record Appendix at page 375 as follows:

> "Q. All right. Now, then, let me ask you something, I hope I am not treading on mistrial ground, in view of your testimony, I am going to ask you, do you remember saying there would only be two holes open at one time?
>
> "A. No, sir.
>
> "Q. Do you remember saying to the woman when she asked some questions, do you remember saying, 'Why didn't he stay over in the right lane, it was available for traffic?'"
>
> Mr. Mahony: Wait a minute, objection.
>
> Mr. Prendergast: In view of his testimony, let the judge decide it. I press the question of the witness.
>
> The Court: I will allow the question.
>
> The Witness: Yes, sir, I did.
>
> "Q. You said that, didn't you?
>
> "A. Yes, sir.
>
> "Q. You would not have made a statement like that if the road was blocked on the right hand side of the road would you?
>
> Mr. Mahony: Again I object."

The foregoing with regard to Mr. Prendergast's reference to Mr. Robinson's testimony was pointed out to the Trial Judge in the "Brief in Support of Motion For a New Trial and for Judgment N.O.V. and in one of the Briefs filed in the United States Court of Appeals For The First Circuit.

The Circuit Court of Appeals For The First Circuit did not deal with the matter of Mr. Prendergast's improper argument regarding the testimony of the witness Robinson in their written opinion. Instead, said opinion deals with the admissability of evidence from the witness Robinson (Page 15 of the "Opinion of the Court" which

is the Appendix hereto,) and which made reference to the testimony of the witness Robinson as set forth on page 376 of the Consolidated Record Appendix. The point made on page 15 of the "Opinion of the Court" with regard to whether Mr. Mahony said "I certainly do" or "I certainly do not" is completely separate and apart from and secondary to the point that Mr. Prendergast referred in his argument to a statement *allegedly introduced in evidence by the witness Robinson but not in fact so introduced.*

Counsel for Mr. O'Brien also used arguments which are believed to have been calculated to appeal to the sympathy of the jury and to prejudice them against Dr. Hobart. Said references are as follows:

In the argument of Robert H. Daley, Esquire, as found on page 500 of the Consolidated Record Appendix:

> "I had intended, as I heard Mr. Mahony outline a scheme of argument to you in which he discussed damages first and went to liability—I had intended, listening to him, to adopt that scheme and to discuss with you, when it came my turn, first the question of damages, the comparatively minimal (702) damages that even Dr. Hobart, on his best evidence has when you listen to the overwhelming injury that Mr. O'Brien had suffered."

In the argument of Michael Prendergast, Esquire, as set forth on page 513 of the "Consolidated Record Appendix:"

> "After listening to these gentlemen, it seems to me I have not only wasted my time and my money, and don't think you buy these pictures for 10 cents, but I am wasting your time and then I am wasting the Court's time".

As set forth on pages 513 and 514 of the "Consolidated Record Appendix":

> From the very beginning when I got into this case, I was out to get the facts, the truth and I spent my

money to do it and I have spent my money to convince you people my main was right and that the pictures those people brought in to try to convince you we were wrong proved we were right.

As set forth on page 515 of the "Consolidated Record Appendix":

> I have spent money to get this for you and I have spend money that will help you and I hope that I haven't thrown it away."

There were six witnesses who testified at the trial of this case and who were actually present at the collision in question, namely, the litigants Dr. Hobart and Mr. O'Brien, Mrs. Irma Belk Hobart, Mr. Robert Whitney, Mrs. Lillian Whitney, and Mr. Joseph Mullaney. There can be no question but that the sum total of the testimony of these witnesses adds to the inescapable conclusion that the verdict of the jury of the United States District Court for the District of Massachusetts was contrary to the evidence. The inescapable conclusion is that the truck driven by Mr. O'Brien was well over to the left of the line which defined the lane for traffic in which he should have been driving. This testimony of the eyewitnesses was enhanced in weight by the testimony of the two police officers namely Americo J. Sousa and Sgt. Daniel F. Driscoll. The testimony of these officers revealed that the tire marks of the truck driven by the litigant O'Brien, even as same can be seen in the exhibits in Volume 2 of the Consolidated Record Appendix, showed that the truck driven by Mr. O'Brien was well over to the left of the line which defines the lane in which he should have been traveling. Mr. O'Brien testified at the trial to the effect that at the last moment the automobile driven by Dr. Hobart veered to the left. With great skill in cross examination counsel for Mr. O'Brien caused Mr. Whitney to say that Dr. Hobart's vehicle had veered slightly to the left just before the accident. This was the only corroboration of Mr. O'Brien's story. The very

obvious fallacy of his story however is that Mr. O'Brien contended that the left front of the automobile driven by Dr. Hobart ran into the back of the left front wheel of the truck which he was driving. The impossibility of such a story, as has been pointed out both in the Motions subsequent to trial in the United States District Court for the District of Massachusetts, and in the United States Court of Appeals for the First Circuit, is as shown in defendant's Exhibit E-12 which is depicted on page 593 of Volume 2 of Consolidated Record Appendix. Said picture shows the running board at the back of said front wheel of said truck and the door above said running board. Not a splinter or sliver has been removed from the running board and there is no dent in the door. This vital piece of physical evidence alone shows the impossibility of Mr. O'Brien's story. Much has been made of the fact that, as a matter of trial strategy, counsel for Mr. O'Brien called Dr. Hobart to the stand early in the trial and that Dr. Hobart became confused and testified at that time that it was the right front of the truck which made contact with the left front of the automobile he was driving. Counsel for Dr. Hobart deemed it advisable not to make an effort to correct this testimony on cross examination but to await the calling of Dr. Hobart as a witness in his own behalf and allow him to then make the correction. Quite obviously an admitted mistake in testimony by Dr. Hobart as to which side of the front of the truck ran into the automobile he was driving lends no credence to the ridiculous story told by Mr. O'Brien. Efforts by counsel for Dr. Hobart to prove the inconsistency of Mr. O'Brien's testimony at the trial in the United States District Court for the District of Massachusetts and in the testimony which he gave when he was charged with and found guilty of "Failing to Keep to the Right When View Is Obstructed", Chapter 89 Section 4 of the Annotated Laws of Massachusetts, were so limited by the Trial Judge in the United States Dis-

trict Court for the District of Massachusetts that when finally the privilege of examination was extended, trial counsel for Dr. Hobart was apparently concerned with the possibility that such examination within the limits placed thereon might result in grounds for mistrial and thereby waived the opportunity to so cross examine. Testimony referred to herein above is set forth or referred to by page numbers under the heading "Argument."

Since the preparation of this Petition for Writ of Certiorari, Washington counsel for Dr. Hobart has received a copy of the "Amended Judgment" of the United States District Court for the District of Massachusetts dated June 27, 1957 and has, therefore, included same in the appendix hereto. Washington counsel for Dr. Hobart had no knowledge of any recent "Motion to Vacate Judgment" in said court.

QUESTIONS PRESENTED

The question is whether or not the courts below erred in not granting a new trial in the United States District Court for the District of Massachusetts or a reversal in the United States Court of Appeals for the First Circuit upon an abundant showing that derrogatory comments by counsel for Mr. O'Brien regarding counsel for Dr. Hobart were tied in with derrogatory statements in his argument by said counsel for Mr. O'Brien regarding counsel for Dr. Hobart.

The question is whether or not the courts below erred in not granting a new trial in the United States District Court for the District of Massachusetts or a reversal in the United States Court of Appeals for the First Circuit, it being pointed out to each court that counsel for Mr. O'Brien made a reference to testimony of the witness John H. Robinson in the argument of counsel for Mr.

O'Brien and that such reference was outside of the scope of the testimony of the witness Robinson.

The question is whether or not the courts below erred in a failure of the United States District Court for the District of Massachusetts to grant a new trial or for the United States Court of Appeals for the First Circuit to order a reversal upon a showing to the effect that the argument of counsel for Mr. O'Brien was of such a nature as would have incited the sympathies of the jury in favor of their client and prejudiced the jurors against Dr. Hobart.

The question is whether the Courts below erred in not granting a new trial in the United States District Court for the District of Massachusetts or a reversal in the United States Court of Appeals for the First Circuit upon an abundent showing to the effect that the verdict returned by the jury in the United States District Court for the District of Massachusetts was contrary to the evidence adduced at trial, including not only the testimonye of witnesses but also the physical evidence, as set forth in the Consolidated Record Appendix to Briefs for the appellants in the United States Court of Appeals for the First Circuit.

ARGUMENT

It is respectfully submitted that there are special and important reasons why this Honorable Court should grant this Petition for Writ of Certiorari and upon consideration of this case reverse the decision of the United States Court of Appeals for the First Circuit and order a new trial. Indeed, if the judgment entered against Dr. Hobart is allowed to stand enforceable, in the light of discrepancies pointed out hereinabove, a new chapter will have been written in our law with regard to improper conduct of counsel, failure of the trial judge to take adequate and proper corrective action regarding such

conduct and the upholding of a verdict which is so clearly contrary to the weight of the evidence as to defy all that is reasonable.

The points upon which this petition is based, although interrelated, can be divided into the four sections as expressed in the four "Questions Presented" hereinabove. In the interest of clarity, each will be dealt with as a sub-section of this argument.

Point re: Derogatory Comments by Counsel for Mr. O'Brien at trial as tied in with Derogatory Comments in closing Argument.

With regard to the argument of counsel, the opinion of the United States Court of Appeals for the First Circuit came to the following conclusion as set forth on page 11 of said opinion:

> "Another ground for Hobart's motion for a new trial in these cases was that the verdict was influenced by wholly improper argument of appellees' counsel. In pursuing this contention on appeal, Hobart largely points to statements made by O'Brien's counsel in his summation to the jury and in a few instances to statements made by appellee's counsel during the course of the trial. Without conceding that the remarks in question exceeded the bounds of propriety, we believe that Hobart cannot resort to them on appeal due to his failure to take timely objections to any of the statements at the trial. See Louisiana & Arkansas Ry. Co. v. Johnson, 214 F. 2d 290 (5 Cir. 1954), cert. denied 348 U. S. 875 (1954). In the absence of such objections the remarks of appellee's counsel are not available to him as grounds for reversal. Furthermore, it should be stated herein that during the trial the judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks for both sides."

It is respectfully submitted that said opinion does not take into consideration the terrifically damaging influence upon the jury of the continued references by Mr.

Prendergast about Mr. Mahony and the tieing in of such references with the statement about Mr. Mahony in the closing argument, all as set forth hereinabove. It is respectfully submitted that it is most improper for a lawyer to make comments regarding the trustworthiness of opposing counsel as a trial proceeds and then in the closing argument to infer that opposing counsel is not "fair and square" and state that he "twists the facts again".

The United States Court of Appeals for the First Circuit, while not conceding that the remarks in question exceeded the bounds of propriety, took the position that Dr. Hobart could not resort to them on appeal due to failure of his counsel to have taken timely objection to any of these statements at trial.

The record, as quoted from pages 99 and 100 of the Consolidated Record Appendix hereinbefore shows that Mr. Mahony did object the first time that Mr. Prendergast made a reference to Mr. Mahony not telling the truth. It is true that there was no objection taken to Mr. Prendergast's statement regarding "sneaking in words" as pointed out hereinabove from page 201 of the Consolidated Record Appendix. Nor was any objection made to Mr. Prendergast's remark to the effect that Mr. Malony was in this case "up to his neck" as set forth in excerpt hereinabove from page 275 of the Consolidated Record Appendix. As the record shows, counsel for Dr. Hobart did not interrupt Mr. Prendergast at any time during Mr. Prendergast's argument. The point with regard to these improper remarks during the trial and statements during the course of Mr. Prendergast's argument is that same were tied in with each other to cast such a shadow upon counsel for Dr. Hobart as to have precluded Dr. Hobart, as the litigant, from substantial justice in this case. It is respectfully submitted that the United States Court of Appeals for the

First Circuit is in error in disregarding the point on the ground that counsel for Dr. Hobart failed to make timely objection. It is not the effect of any *one* such comment or statement which was pointed out to the United States Court of Appeals for the First Circuit and is again pointed out here. It is the effect upon the jury of all of these comments and statements which add up to a prejudice against Dr. Hobart as a litigant.

The United States Court of Appeals for the First Circuit also took the position that the trial Judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks of counsel for both sides. Present counsel for Dr. Hobart has searched the record and has found no instance whatsoever in which counsel for Dr. Hobart made any comment regarding counsel for Mr. O'Brien which would have tended to have caused the jury to have a lesser regard for the trustworthiness of counsel for Mr. O'Brien. It is true, as shown on page 100 of the Consolidated Record Appendix, that after Mr. Mahony objected to Mr. Prendergast having said that Mr. Mahony "won't tell us the truth" that the trial judge said "alright, counsel doesn't mean anything by that". It is also true, as is set forth on page 275 of the Consolidated Record Appendix, that after Mr. Prendergast had said that Mr. Mahony was in this case "up to his neck" the trial judge said "you must disregard comments. They are made in a spirit of fun. We want to judge the case on the testimony".

The opinion of the United States Court of Appeals for the First Circuit is to the effect that a condition precedent for a reversal on grounds of impropriety of counsel is that objection must be made to comments made by counsel while evidence is being introduced and objection must be made to statements in the closing arguments. The opinion of the United States Court of Appeals for the First Circuit indicates that where a trial judge in

some instances makes corrections and tells a jury either to disregard a certain comment or that another comment was made in a spirit of fun that such remarks by a trial judge will overcome the prejudices which can be built up within jurors against a litigant when the trustworthiness of litigant's attorney is challenged by comments during the introduction of evidence and by statements in the closing argument which are tied in, by the nature of same, to the earlier comments.

It is respectfully submitted that the law is as set forth, both in the Brief in Support of Motion in the court below and the Brief submitted to the United States Court of Appeals for the First Circuit, the same being found on page 273 of 64 Corpus Juris under the heading "Trial", the subheading "Propriety of Particular References, Comments and Arguments" and the Sub-subheading "Comments on Credibility or Conduct of Parties, Attorneys or Witnesses—In General," as follows:

> "Where his remarks are not sustained by the facts it is improper for counsel in argument to make statements reflecting upon the character or conduct of the opposite party or his attorney . . ."

In addition to the foregoing, American Jurisprudence brings in the element of whether or not the misconduct of counsel was detrimental to his opponent in the following quotations as set forth in 3 American Jurisprudence pages 607 and 608 in Section 1059 under the Heading "Appeal and Error", Subheading Misconduct of Counsel," Sub-subheading, "Trial Generally", as follows:

> "As a general rule, a judgment will not be reversed for misconduct of counsel, unless the appellate court is of the opinion that such misconduct had a prevailing influence upon the jury to the detriment of the appellant."

Under an entirely different title, namely, 53 American Jurisprudence page 410, in Section 507 under the heading,

"Trial", the Subheading, "Argument and Conduct of Counsel" and the Sub-subheading "Admonition of Counsel", the law is set forth with reference to the unrestrained misconduct of counsel, as follows:

> "The trial court should not only sustain objections to improper conduct and argument of counsel and charge the jury to disregard it, but should rebuke and reprimand offending counsel as well, in order to stop its repetition."

The latter two quotations were included in the Brief in Support of the Motions in the United States District Court for the District of Massachusetts but were not included in the Brief in the United States Court of Appeals for the First Circuit.

Counsel for this petitioner has studied the case of Louisiana and Arkansas Ry Co. v. Johnson, 214 F 2d. 290 (5 Cir. 1954), cert. denied 348 U. S. 875 (1954) cited on page 11 of the Opinion of the United States Court of Appeals For The First Circuit and can come to only one conclusion, namely, that the remarks made by counsel in the case of Louisiana and Arkansas Ry Co. v. Johnson, supra, did not compare in seriousness with the cutting derogatory comments and statements regarding counsel for Dr. Hobart, as pointed out hereinabove. The opinion of the Court of Appeals in said case deals, primarily, with prejudicial remarks of the Trial Judge.

Point Re: Argument of Counsel which was outside of the scope of the Evidence.

It is pointed out both in the Brief in Support of the Motions filed subsequent to trial in the United States District Court for the District of Massachusetts and in one of the Briefs in behalf of Dr. Hobart in the United States Court of Appeals for the First Circuit that Mr. Prendergast, in his closing argument, made a reference to the words allegedly spoken by the witness John H.

Robinson which, though they may possibly have been spoken at some other time, were not spoken as evidence in the trial of this case. The specific words are set forth hereinabove from the argument of Mr. Prendergast as found on page 518 of the Consolidated Record Appendix and are repeated to avoid a cross-reference:

> "I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened."

The testimony of the witness Robinson as pointed out hereinaboye under the heading Statement of the Matter Involved, as taken from page 375 of the Consolidated Record Appendix, most certainly did not justify any such statement as was made by Mr. Prendergast. The United States Court of Appeals for the First Circuit did not specifically pass upon this point. Should this Honorable Court fail to grant the writ of mandamus and order a new trial we would have a situation in which counsel had spoken words which were purported to be the words of a witness and which, if ever spoken, were not introduced in evidence at the trial of the case. Never in the history of Anglo-American jurisprudence has there ever been a more shocking miscarriage of justice than is the case which is the subject of this petition. No point is more shocking than the use in argument of a terribly damaging punchline, as attributed by Mr. Prendergast to the witness Robinson, which in fact was not spoken at the trial of this case by the witness Robinson. The law with regard to this situation is basic. It is set forth as follows, from 64 C. J. Page 276, under the heading "Trial", the subheading, "Right to Counsel; Argument and Conduct of Counsel", sub-heading "Propriety of Particular

References, Comments and Arguments" and paragraph heading "Appeals to passion or Prejudice, in General:

> "Arguments and comments by counsel calculated to arouse the passions and prejudices of a jury by presenting to them considerations extraneous to the evidence are highly improper".

POINT RE: ARGUMENT OF COUNSEL INTENDED TO INCITE THE SYMPATHIES AND PREJUDICES OF THE JURORS.

References are made in the "Statement of the Matter Involved" hereinabove to excerpts from the argument of Robert H. Daily, Esquire, as found on page 500 of the Consolidated Record Appendix and from the argument of Michael Prendergast, Esquire, as set forth on page 513, again on pages 513 and 514, and a third excerpt from page 515. It is believed and therefore respectfully submitted that the same quotation of law set forth hereinabove supports the contention that such statements were improper. Said statements were obviously calculated to arouse the passions and prejudices of the jury against Doctor Hobart by arguing matters extraneous to the evidence, and, when tied in with other points hereinabove, support the basis for a reversal and a new trial in this case.

POINT RE: VERDICT OF JURY HAVING BEEN CONTRARY TO THE EVIDENCE AND TO THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

In consideration of the fact that this Honorable Court will only grant the writ of certiorari where there are special and important reasons for doing so, it is realized that the fact that a jury has returned a verdict which is contrary to the evidence, standing alone, would not, generally, be the basis for this Honorable Court to grant a writ of certiorari. However, where, as in this case, there has been a gross miscarriage of justice, including

not only the discrepancies in the trial as pointed out hereinabove but also a verdict which was contrary to the evidence and the weight of the evidence adduced at trial, the sum total is such as to make out special and important reasons why the writ should be granted, and this Honorable Court review this cause and grant a reversal. A full and complete understanding of testimony with regard to the collision can only be obtained by reading the entire transcript of the testimony of the eyewitnesses to the collision and of the police officers who investigated the collision, all as referred to hereinabove. However, the crux of the testimony of the eyewitnesses is as set forth in the following excerpts:

From the testimony of Dr. Harold M. Holart as set forth on pages 439 and 440 of the Consolidated Record Appendix:

> "Q. Now, from that point on will you describe anything which you observed as to the course of the truck?"
>
> "A. When he approached me he was—when he got within about four or five carlengths the truck left the lane and came toward me at an angle, came over into my lane, I would judge about half the width of the truck, and the driver's side, the left side of the truck struck the left side of the car I was driving."
>
> "Q. Now, at the point of when you first saw him come over, as you have testified, into your lane, what, if anything, did you do in the operation of your car? A. I applied my brakes. I was unable to turn into the right lane because of the obstruction there, some piles of dirt, and we immediately made contact with the truck."
>
> "Q. I think you stated when you first saw the truck start over into your lane it was, according to your best memory, four or five carlengths away? A. I would judge that."
>
> "Q. What is your best estimate as to your own speed at the time you first saw the truck start into your lane? A. I would judge about 30 miles an hour."

"Q. What is your best estimate as to the speed of the truck at that point?' A.' Between 40 and 50 miles an hour."

"Q. Now, what is your best estimate of the speed of your car at the moment of the contact between your car and the truck? A. I believe it was pratically stopped.

"Mr. Prendergast: May that go out, your Honor?

"Mr. Buzzell: I think it is responsive, if your Honor please.

"Mr. Prendergast: He was asked the speed at the time of the accident.

"The Court: It was not responsive to the question, Mr. Buzzell. I will order it striken.

"Mr. Buzzell: He wasn't moving.

"Mr. Prendergast: He says he was practically stopped.

"Mr. Buzzell: All right, let's have it more specific.

"Q. How fast, if at all, do you think you were moving?

"Mr. Prendergast: I pray your Honor's judgment. Not how fast if at all. He has already said he was practically stopped. That means movement.

"Mr. Buzzell: I want to find out what it does mean.

Mr. Prendergast: All right.

"Mr. Buzzell: Let the witness say.

"The Court: All right. (To witness) How fast were you going?

"The Witness: Five miles an hour."

From the testimony of Mrs. Irma Belk Hobart as set forth on page 480 of the Consolidated Record Appendix:

"Q. Now will you describe for the jury the subsequent course of travel, as you observed it, and what happened from that point on? A. The truck continued in an easterly direction, with its wheels still over the white line, and continued to come more in the center lane than it had been when I first saw it."

From the testimony of Mr. Robert Whitney as set forth on page 396 of the Consolidated Record Appendix:

"Q. When you say you saw the truck, going back

over it again—when you first saw the truck, where was it? A. He was traveling with two wheels in the center lane and two wheels in his right lane."

"Q. What two wheels were in the center lane? A. His left wheels."

"Mr. Prendergast: All right.

"Q. What did you see after that? A. I see him come on and hit the Chrysler.

"Q. Where was the Chrysler when he hit him? A. Just his front wheels, about at the construction holes before the Acton line."

"Q. In what part of the road was the Chrysler traveling? A. On the right side of the center lane, right up next to the construction."

From the testimony of Mrs. Lillian Whitney as set forth on page 430 of the Consolidated Record Appendix:

"Q. Tell us what you saw. A. He kept on coming more over the white line into the middle lane."

"Q. Go on and tell just what you saw. A. And when he was about straddling the white lane, the white line, he came in contact with the Hobart car."

"Q. And how much of his truck was in the middle lane at the time of the contact between the truck and the Hobart car? A. I would say just about half of it".

From the testimony of Mr. Joseph Mullaney (the passenger in the cab of the truck driven by Mr. O'Brien) as set forth on page 203 of the Consolidated Record Appendix:

"Q. Did you see this accident happen? A. No.

"Q. Were your eyes open at the time the accident happened? A. Partly.

"Q. Where were you looking? A. Out the window."

"Q. Which window? A. The right window."

"Q. All right. Did you see any of these cars? Withdraw that. Did your see the cars or any cars coming in the opposite direction just before the accident happened? (246) A. No."

"Q. You were still looking out the window? A.

I didn't notice them. I didn't pay no particular attention.

"Q. All right. You say at the time the accident happened you were looking out the right window? A. That's right.

"Q. Did you see out the right window as you were looking? A. Fields.

"Q. What else? A. Guard rail.

"Q. Did you see the guard rail? A. Yes.

"Q. Tell the Court and Jury what you mean by that. A. That's the fence along the side of the road.

"Q. Was there a cement post and then wires and then another cement post and then wires. A. Yes, cement posts.

"Q. Can you tell the Court and Jury approximately how far that cement—those posts and guard rails were from the right side of the truck at or just before the accident happened? A. About 6 feet."

The heart of the testimony of the Police Officers which verifies the contention that the verdict was contrary to the evidence is as follows:

From the testimony of Officer Americo J. Sousa as set forth on page 307 of the Consolidated Record Appendix:

"Q. Then the fence. Now so far as the truck is concerned what did you observe about that? A. The truck was facing in a northerly direction with the front end up against the State fence, and I observed that the right front wheel of the truck had leading from it some tire marks on the road, which led from the right front tire 90 feet into the eastbound lane, approximately 2 feet over the solid white line.

"Q. Over the what? A. Over the line."

Mr. Daley: If that is offered as any indication as to a line put there under authority of the State to mark off the road, I object, because of the evidence we have."

Mr. Prendergast: Unless it is legally established in accordance with law, that it was there in accordance with law."

"Q. This mark you have been referring to—

"The Court: Let me have the question and answer.

(The question and answer are read.)

"Mr. Mahony: This mark, I think the officer has been referring to, is a mark, a wheel mark."

"(409) Q. Is it not? A. It's the back tire mark left on the Macadam surface of the road by the right front wheel of the tractor truck."

"Q. That you say went 90 feet back toward the west? A. And that went 90 feet back towards the westerly direction."

"Q. From the most westerly point where it began, how close was that mark where it began to the right side or the most southerly side of the traveled part of the road? A. Approximately 8 feet."

"Q. Where it ended you say was at the right front wheel of the truck—it was up against the fence? A. Yes."

From the testimony of Sergeant Daniel F. Driscoll as set forth on page 354 of the Consolidated Record Appendix:

"Q. Sergeant, the mark which you referred to and testified to as leading to the right front wheel of the truck, that wheel wasn't a dual wheel but a single wheel? A. That is correct.

Sergeant Driscoll's testimony referred to Plaintiff's Exhibit Number 9 which constitutes page 613 of Volume II of the Consolidated Record Appendix. The significience of the testimony is that Sergeant Driscoll identified the tire mark as having led up to the right front wheel of the truck driven by Mr. O'Brien.

The opinion of the United States Court of Appeals for The First Circuit, in summing up the testimony, on pages 3, 4 and 5 of said opinion, made much of the fact that Dr. Hobart when called as a witness by his opponent became confused and stated, as set forth on page 273 of the Consolidated Record Appendix, that the right front bumper of the truck driven by Mr. O'Brien hit the left front bumper and wheel of the automobile driven by Dr. Hobart; that Mr. O'Brien testified that he was on the

right side of the road and that Dr. Hobart's automobile "came toward him, hitting the left front side of his truck", and that Mr. Whitiney testified "that the Hobart automobile turned to the left immediately prior to the accident, and the collision occured as it was turning".

Dr. Hobart corrected the testimony given earlier in the trial, and testified, as set forth in the excerpt from page 439 hereinabove, that the left side of the truck hit the left side of his automobile.

Mr. O'Brien's story about the collision in question, as given at the trial of this case in the United States District Court for the District of Massachusetts, as set forth on pages 58 through 62 of the Consolidated Record Appendix is completely unworthy of belief. The most incredible part of his testimony is the following excerpt from pages 61 and 62 of the Consolidated Record Appendix:

> "Q. Did that car and your truck come in contact? A. Yes."
>
> "Did you see the car and your truck come in contact? A. Yes."
>
> "Q. What part of the car came in contact with your truck? A. The left front."
>
> "Q. What part of your truck came in contact with the automobile? A. Left front wheel at the rear."
>
> "Q. The rear of the left front wheel? A. That's right."

The vast preponderance of the testimony, as pointed out hereinabove, was that the left side of the truck driven by Mr. O'Brien was well over to the left edge of the lane in which he should have been driving.

Defendant's Exhibit E-11 or the blown up version of same, which is plaintiff's Exhibit Number 8, best depicts the lane in which the truck driven by Mr. O'Brien should have been traveling just before and at the time of this accident. The skid marks show how far his truck was

from the right edge of the roadway. His own helper, Mr. Mullaney, as shown hereinabove, estimated that the right side of the truck was 6 feet from the guard rail along the southernmost edge of the road. Officer Sousa, as pointed out hereinabove, testified that the skid mark from the right front wheel of Mr. O'Brien's truck was "approximately 8 feet" from the right side or most southerly side of the road. When one adds the width of the truck driven by Mr. O'Brien (and he said it was 8½ feet wide, page 57 of the Consolidated Record Appendix) to the distance from the right front wheel to the southernmost edge of the road the conclusion is inescapable that this accident must have occurred by reason of the left side of the truck driven by Mr. O'Brien having been well over to the left of the line which defined the left side of the lane in which he should have been traveling. *However, even without the foregoing, Mr. O'Brien's story to the effect that Dr. Hobart's vehicle ran into the rear of the left front wheel of the truck that he was driving was obviously erroneous when one looks at Exhibit E-12, page 493, Volume II of the Consolidated Record Appendix and notes that the running board and cab door just in back of said left front wheel remained through said accident without blemish and so appeared after the accident.*

It is true that the witness Whitney under pressure of cross examination gave the following testimony which was referred to on pages 4 and 5 of the opinion of the United States Court of Appeals for the First Circuit "that the Hobart automobile turned to the left immediately prior to the accident, and that the collision occurred as it was turning". Said testimony as found on pages 401 and 402 of the Condensed Record Appendix is as follows:

> "(551) X-Q. Did you ever see the Hobart car do anything other than head in the direction of Acton, from the time you saw the truck up until the accident happened? A. No, sir.

"X-Q. Did you ever see the Hobart car turn to the left at any time from the time you first saw the truck, up until the accident happened? A. He might have turned away."

"X-Q. Not what he might have done, Mr. Whitney. The question is very simple, did you ever see the Hobart car turn to its left at any time between the time you first saw the truck and up until the accident happened? A. Slightly, maybe."

"Mr. Prendergast: I didn't ask you whether it was slight or not. May that go out, Your Honor?"

"The Court: 'Slightly', 'maybe' yes, it may".

"X-Q. You have no interest in this case, have you? A. No, sir."

"X-Q. You are not prejudiced against the truck driver, are you? A. No, sir."

"X-Q. Let me ask again, at any time from the time you first saw the truck up and until this accident happened, did you ever see Dr. Hobart's car turn to the left? A. Yes, sir."

"X-Q. You told the police that didn't you? (552) A. Yes, sir".

"X-Q. And when he turned to the left, the accident happened, didn't it? A. Yes, sir."

"X-Q. And you were within 50 feet of this accident when you saw that happening. That is so, isn't it? A. Yes, sir."

It is also true, however, that in addition to the above referred to testimony on direct examination by the witness Robert Whitney, on cross examination he *again* placed the truck driven by Mr. O'Brien well over to the left of the lane in which said truck should have been traveling. This testimony is as found on pages 399-400.

"X-Q. About what speed was the car in front of you traveling at? A. I would say, about the same."

"X-Q. You were both in the center lane, were you? A. Yes, sir".

"X-Q. Now at some time while you were operating in the center lane, do you see a truck coming in the opposite direction? Is that correct? A. Yes, sir."

"X-Q. At that time you say that the truck's left wheels were also in the center lane, is that correct? A. Yes, sir."

"X-Q. In other words, the first time you saw the truck, its left wheels were in the center lane, is that right? A. Yes, sir."

"X-Q. How far in the center lane were the left front wheels of the truck? A. I would say almost straddling it completely."

"X-Q. How far now in footage? A. I cannot say."

"X-Q. Did you ever say 2 or 3 feet? A. Yes, I might have approximated that."

"X-Q. Did you at some time under some different circumstances (549) and while under oath, say this: that the truck's left wheels were in the center lane a distance of 2 to 3 feet? A. I probably approximated that, sir."

"X-Q. If that was so, was that the truth at that time? A. Yes, sir."

"X-Q. It would likewise be the truth today? A. Yes, sir."

"X-Q. It it fair now, without any qualifications at all, your first memory is, the left wheels of the truck were on the center lane, 2 to 3 feet? A. Yes, sir."

It is most respectfully submitted that the testimony of Mr. Whitney could not possibly constitute sufficient corroboration to sustain any contention other than that by the vast preponderance of the oral evidence and the physical facts this accident was caused by the truck driven by Mr. O'Brien being well over to the left of the lane in which it should have been traveling. Even if some credence should be given to Mr. O'Brien's story and the alleged corroboration of Mr. Whitney, the verdict of the jury in the United States District Court for the District of Massachusetts most certainly was contrary to the law regarding contributory negligence. It is respectfully submitted that Mr. O'Brien's story, as allegedly so corroborated is, in view of the evidence pointed out hereinabove, totally unworthy of belief. It is the

position of counsel for Dr. Hobart that the negligence of Mr. O'Brien and only that of Mr. O'Brien caused this collision. As a matter of law however, it is basic that even though the position of counsel for Dr. Hobart did not stand up in the motions filed in the United States District Court for the District of Massachusetts or in the United States Circuit Court for the First Circuit or should not stand up in this Honorable Court, yet, the very necessity of Mr. O'Brien's contributory negligence, from all of the evidence and more particularly from that pointed out above, should have caused the motion for a new trial to have been granted by the trial judge or a reversal in the United States Court of Appeals for the First Circuit or, taken with the other discrepancies of this trial as pointed out hereinabove, should form the basis for a reversal by this Honorable Court.

The position taken by the Justices of the United States Court of Appeals for the First Circuit, with regard to petitioner's contention that the verdict was contrary to the evidence, is summed up on pages 9 and 10 and the top of page 11 of the opinion of said Court. The opinion of said Court appears to counsel for petitioner to be that since whenever the evidence is such that fair minded men may draw inferences therefrom and reasonably disagree as to what the verdict should be the matter is for the jury, the same being taken from quotations from the case of American Fiduciary and Casualty Company vs. Dexter, 220 F. 2d 930, 932, 933 (5 Cir. 1955) is set forth on page 9 of said opinion. The position of the United States Court of Appeals for the First Circuit also appears to be that once a case has become the subject of a finding by a jury and the jury has rendered a verdict, the Trial Court should not, nor should a Court of Appeals reverse such finding unless there is an abuse of discretion on the part of the Trial Court in failing to grant a new trial the same being supported, according to said opinion, by

the case of Thiringer vs. Barlow, 205 F 2d. 476, 478 (10 Cir. 1953). The position taken by the Court of Appeals appears to counsel for petitioner to be that from the summary of the testimony of the eyewitnesses and the conflict in the evidence there was a question for the jury, that Dr. Hobart's confusion in describing the collision may have worked against him in the minds of the jury, and that the jury could have found from the evidence that Mr. O'Brien at all times remained on the right side of the road and that the collision was caused by Dr. Hobart's turning to the left. The United States Court of Appeals for the First Circuit takes the position that the pictures of tire marks and position of the vehicles after the accident did not constitute physical facts which flatly contradict and therefore nullify the oral testimony. Counsel for petitioner most thoroughly and heartily agrees with the fact that the pictures do not nullify oral testimony but that, to the contrary, the pictures submitted in evidence, as referred to hereinabove, support the testimony of the eyewitnesses to the effect that the truck driven by Mr. O'Brien was well over to the left of the line which defined the left edge of the lane in which it should have been traveling. This testimony of the eyewitnesses constitute the vast preponderence of the evidence and is supported by the pictures, including that picture referred to herein above, which shows not a splinter off of the running board in back of the left front wheel of the truck driven by Mr. O'Brien and not a dent in the left door of the cab of said truck. This evidence of the eyewitnesses as to how the accident really happened, supported as it was by the pictures, constitutes, it is respectfully submitted, such a vast preponderance of the evidence, when compared with Mr. O'Brien's story and the fallacy in connection therewith, as to meet the test as set forth in the excerpt from American Fiduciary and Casualty Company, supra, and show that fair minded men could not draw inferences

therefrom; and also to meet the test set forth at the bottom of page 10 and the top of page 11 with regard to abuse of discretion. It is respectfully submitted to this Honorable Court that the failure of the Trial Judge in the United States District Court for the District of Massachusetts to grant a new trial did constitute an abuse of discretion and that it was error for the United States Court of Appeals for the First Circuit to take the position that there was no abuse of discretion in the denying of the motion for a new trial in the Court below:

"It is true that the case of Lavender v. Kurn, 327 US 645, 658, 665 S. Ct. 740, 744, 90 L. Ed. 916 supports the excerpt from the case of American Fidelity and Casualty Co. v. Drexler, supra, quoted on pages 9 and 10 of the opinion of the United States Court of Appeals for The First Circuit. However, the question in both Lavender v. Kurn and American Fidelity and Casualty Co. v. Drexler was whether or not there was some evidentiary basis for the jury's decision. There was in both of said cases. It is respectfully submitted that there was no evidentiary basis for the jury's decision in this case, but even more certainly that there could have been no possible evidentiary basis for the verdict holding Dr. Hobart to have been totally liable for the collision, upon the basis of negligence, and that allowing the judgment for Mr. O'Brien to stand unreversed violates the basic law regarding "contributory negligence" as set forth in 38 American Jurisprudence under the title "Negligence", the sub-heading "Contributory Negligence, the sub-sub-heading "In General and the paragraph "Generally"; defense at Common Law"; on pages 848, 849 and 850."

"No one can charge another in damages for negligently injuring him where his own failure to exercise due and reasonable care was responsible for the occurrence of the injury. Although it may be shown that the defendant did not exercise care, yet no recovery will be allowed

against him if it further appears that the injury would have been avoided if the person injured had exercised care on his part."

As this case now stands, even if negligence should be imputed by Dr. Hebart by the ridiculous story of Mr. O'Brien supported only by the corroboration of Mr. Whitney, heretofore commented upon, Mr. O'Brien should surely not be allowed this tremendous recovery in the light of Mr. O'Brien's negligence as proven by the vast preponderance of the verbal evidence and as supplemented by the physical facts brought out in the evidence.

Weight is added to the foregoing contention of counsel for this petitioner by the following quotation from Babbitt on "Motor Vehicle Law", Fourth Edition, as found in Chapter XXXVIII heading "Automobile Negligence", Section III "Contributory Negligence", Paragraph 1377, In General", pages 975 and 976 which is as follows:

> "and plaintiff's disregard of statute, if contributing to his injury, precludes recovery."

The case of Cannon v. Bassett 264 Massachusetts Reports, 162 N. E. 772 is cited in support of the foregoing in the footnotes. The following is an excerpt from page 386 of said case

> "The jury was fully and correctly instructed that disregard of the statute was evidence of negligence, and if the plaintiff's disregard contributed to the accident that no recovery was possible: * * *".

Continuing on the same paragraph from Babbitt on "Motor Vehicle Law" as quoted above, on page 976 we find the following:

> "Upon this general principle of law a plaintiff whose conduct proximately contributed to or caused his injuries, is precluded of his right of recovery, under the following situations * * * where he failed to keep to the right * * *."

The footnotes in support of said quotation cite the case of Maritzky v. Chadwick Hayes Co., 12 La. App. 104, 124 Southern 566. In that case the Court on page 568 (124 Southern) used the following language:

> "Counsel for defendant urge the point that, if it be held that driver of plaintiff's car was negligent, then it follows that defendant should recover for the damage done to its truck. That does not necessarily follow. Defendant's driver was also negligent. When he passed over the bridge, he saw or could have seen if he had looked, the automobile approaching from the opposite direction. It was then his duty to swerve his truck over to the right hand side of the road as far as he could with safety. Instead of doing that, he proceeded straight down the road until he met the automobile, at which time the extreme left hand portion of his truck was at least 2 feet beyond the center of the road. There is no reason suggested why he should not have gotten entirely over on his side of the road. The fact that he did not do so is due to his own fault and negligence. *It is perfectly clear that the truck driver's negligence in getting across the center of the road contributed to the collision. We think that even though Mrs. Maritzky was negligent, defendant's contributory negligence was such as to bar its recovery.*" (Emphasis added).

Although the analogy between the case which is the subject of this petition and Maritzky v. Chadwick Hayes Co., supra, is not an exact one, by reason of the fact that, by the preponderance of the evidence, supported by the physical facts as pointed out hereinabove, and by reason of the unworthiness of belief of Mr. O'Brien's story as contradicted by the preponderance of the evidence and the physical facts, Dr. Hobart was not guilty of any negligence, yet, even if he had been, Mr. O'Brien, under the rule as to driving on the wrong side of the road as set forth hereinabove, should have been and should now by this Honorable Court be precluded from enforcing the judgment against Dr. Hobart.

Although Mr. O'Brien's conviction for "Failing to keep to the right when view is obstructed", as shown on page 562 (Volume II) of the Consolidated Record Appendix, could not be brought out in evidence in the trial of the case, upon which this petition is based, in the United States District Court For The District of Massachusetts, same was known to the United States Court of Appeals For The First Circuit by inclusion thereof in said Consolidated Record Appendix. It is respectfully submitted that such conviction adds tremendous weight to the foregoing argument regarding the negligence and/or contributory negligence attributable to Mr. O'Brien which should preclude the enforcement of the judgment and justify a reversal by this Honorable Court.

It is respectfully submitted that a careful review of the case of Merchants Motor Freight v. Downing, 227 F (2d) 247 (8 Cir 1955) as referred to on page 10 of the opinion of the United States Court of Appeals for the First Circuit does not disclose any principle of law which is contrary to the above referred to basic principles. That case turned on a failure of the Trial Judge to have instructed the jury on the question of "care required in an emergency" and the verdict in favor of the defendant on his counter claim was reversed and the case remanded to the District Court for a new trial.

In view of the review of the evidence, as set forth hereinabove, counsel for this petitioner takes the position that the evidence offered by Mr. O'Brien was so unworthy of belief that there was no issue for the jury and that the finding to the effect that Mr. O'Brien was not even contributorily negligent renders this case as a most gross miscarriage of justice which should have been corrected by a reversal based upon the motions in the United States District Court For the District of Massachusetts or by the United States Court of Appeals For The First Circuit.

It is true that the principle is established by the case of Thiringer v. Barlow 205 F. 2d 476 (10 Cir., 1953), as referred to on pages 10 and 11 of the Opinion of the United States Court of Appeals For The First Circuit, that (as found on page 478):

> "A motion for new trial is addressed to the sound judicial discretion of the trial court and the action taken thereon is not open to review on appeal unless it appears that there was an abuse of discretion."

The United States Court of Appeals for the First Circuit held that there was no abuse of discretion on the part of the Trial Judge in the United States District Court For The District of Massachusetts in denying the Motions filed in said Court subsequent to the verdict of the jury against Dr. Hobart in the sum of $61,000.00. This Honorable Court is respectfully requested to issue the Writ of Certiorari and to determine that there was an "abuse of discretion" in the failure of the Court below to grant the Motion for a New Trial and that the Court of Appeals erred in not recognizing such abuse of discretion and ordering a New Trial.

SUMMATION OF ARGUMENT

The strong points in behalf of the petitioner Dr. Hobart as brought out hereinabove, even at the expense of repetition, are that at the trial counsel for Mr. O'Brien belittled the trustworthiness of Thomas H. Mahony, Esquire, and then pinched home to the jury, in his closing argument, a contention to the effect that Mr. Mahony was not trying to be "fair and square" and that Mr. Mahony had "twisted the facts"; that counsel for Mr. O'Brien misquoted, in his closing argument, a statement allegedly made in evidence (but not in fact made) by the witness John H. Robinson; and that the evidence adduced at the trial so clearly showed that the collision in question was caused by the negligence of Mr. O'Brien, by being on the wrong

side of the road, and his own story as to how the accident happened was so completely fantastic that this case resulted in such a gross miscarriage of justice as is shocking. Any one of the foregoing points, or even the point regarding the appeal by counsel for Mr. O'Brien to the prejudices of the jury could well be considered the "special and important reasons" why this Honorable Court should grant the Writ of Certiorari and, upon a hearing order a new trial. The composite whole of the points made hereinabove, point to only one result, namely, that a Washington doctor is the victim of chicanery practiced in the United States District Court for the District of Massachusetts and that our entire judicial system is in danger of ridicule, unless this Honorable Court will take jurisdiction of this case and grant relief.

Respectfully submitted,

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APPENDIX

"FAILING TO KEEP TO THE RIGHT WHEN VIEW IS OBSTRUCTED": CHAPTER 89 SECTION 4 OF THE ANNOTATED LAWS OF MASSACHUSETTS.

"VEHICLES TO KEEP TO RIGHT WHEN VIEW OBSTRUCTED; EXCEPTIONS; Whenever on any way public or private, there is not an unobstructed view of the road for at least 400 feet, the driver of every vehicle shall keep his vehicle on the right of the middle of the traveled part of the way, whenever it is safe and practicable so to do, except that the Department of Public Works may alter this provision by the use of restrictive pavement markings in areas of limited sight distance, at intersections and at obstructions in the highway on state highways, on ways leading thereto and on all main highways between cities and towns; provided, that such markings shall be in accordance with accepted standards of engineering practice but, notwithstanding the foregoing provision every driver of a slow moving vehicle, while ascending a grade shall reasonably keep said vehicle in the extreme right-hand lane until the top of such grade has been reached".

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 5172

HAROLD HOBART, Defendant, Appellant,

v.

MICHAEL P. O'BRIEN, Plaintiff, Appellee;

No. 5173

HAROLD M. HOBART, Plaintiff, Appellant,

v.

JOHN G. DONOVAN ET AL., Defendants, Appellees.

Appeals from the United States District Court
for the District of Massachusetts

Before WOODBURY and HARTIGAN, *Circuit Judges*, and FORD, *District Judge*.

Thomas H. Mahony, with whom *Joseph G. Bryer* was on brief, for Harold Hobart, appellant in No. 5172.

Michael Prendergast, with whom *Reuben Nitkin* was on brief, for Michael P. O'Brien, appellee in No. 5172.

Philip B. Buzzell, with whom *Charles M. Ewing* and *Hemenway & Barnes* were on brief, for Harold Hobart, appellant in No. 5173.

Philander S. Ratzkoff, with whom *Robert N. Daley* and *Parker, Coulter, Daley & White* were on brief, for John G. Donovan et al., appellees in No. 5173.

OPINION OF THE COURT.

April 22, 1957.

HARTIGAN, *Circuit Judge*. These appeals are from final judgments based upon jury verdicts in personal injury actions, entered in the United States District Court for the District of Massachusetts on December 13, 1955, one (No. 5172) ordering that plaintiff-appellee, Michael P. O'Brien, recover of the defendant-appellant, Harold M. Hobart, in the sum of $61,000 with interest thereon from June 26, 1952 totalling $12,677.83, and the other (No. 5173) denying the claim for recovery of plaintiff-appellant, Harold M. Hobart against defendants-appellees John G. Donovan and Michael P. O'Brien. Subsequent to judgment a remittitur of $13,000 was made by appellee O'Brien in accordance with an order of the court.

The litigation arose out of a collision of a tank truck owned by appellee John G. Donovan, d.b.a. the Utility Oil Co., and driven by his employee, appellee O'Brien, and an automobile owned by Irma B. Hobart and driven by her husband, appellant Hobart, on Route 2 in Concord, Massachusetts, on June 21, 1952. Jurisdiction was based upon diversity of citizenship.

By a complaint filed June 26, 1952 appellee O'Brien alleged that appellant Hobart negligently drove a motor vehicle so that it collided with the motor vehicle being operated by O'Brien. In a complaint filed May 8, 1953 appellant Hobart alleged that appellee Donovan and his employee, appellee O'Brien, negligently drove a motor vehicle on the aforementioned public highway against Hobart who was then driving on said highway. The two actions were consolidated for trial.

In seeking reversal of the judgment entered for appellee O'Brien, Hobart, as defendant appellant, asserts that the trial court erred in refusing to grant (1) his motion for summary judgment; (2) his motion for directed ver-

dict and (3) his motion for judgment n.o.v. or a new trial. In addition, Hobart assigns as error certain rulings of the trial court on evidence, excessive damages and the allowance of interest from the date of the writ.

In seeking reversal of the judgment denying his claim for recovery, Hobart, as plaintiff-appellant, asserts that the trial court erred in refusing to grant his motion for new trial and assigns as error certain rulings of the trial court on evidence. Since the two appeals to some extent turn on similar issues, we shall treat them both in this opinion.

The record shows that in the early afternoon of June 21, 1952 Hobart was traveling west on a section of Route 2 that was comprised of three lanes. As he approached the town line between Concord and Acton, approximately one quarter of a mile east of the scene of the accident, he observed indications of construction going on and found the northern lane obstructed by warning signs, dirt, materials and equipment. By reason of these obstructions he went into the middle lane. Traveling behind him some fifty feet was an automobile driven by Robert Whitney, a witness at the trial.

O'Brien, driving a tank truck in the course of his duty as an employee of Donovan, was traveling east in the southern lane of this highway. As Hobart and O'Brien approached and went to pass each other their vehicles collided. The truck and automobile, as a result of the collision, ended up against a guard rail on the northern lane, Hobart's car facing south and the truck facing northeast.

Hobart, in describing the accident, testified that he was traveling 25-30 miles an hour, that he at all times remained in the center lane and that when the O'Brien truck was four or five car lengths away, it left the southern lane and came into the center lane at an angle, colliding with his automobile. At one point in the trial

Hobart said it was the truck's right bumper that hit his left front bumper. Later he changed this testimony, stating that it was the left front side of the truck that collided with the left front side of his automobile. Irma B. Hobart, the appellant's wife, who was riding in the automobile with him gave the same general description, except that she testified specifically that the left front of the truck hit the left front of the Hobart automobile.

O'Brien, on the other hand, testified that he was traveling approximately 25 miles an hour, that he was on the "right side" of the road and that the Hobart car came towards him, hitting the left front side of his truck. He further testified that the force of the collision pulled the wheel out of his hands and "swung the truck completely around," throwing him to the right side of the cab.

On cross-examination O'Brien testified as follows:

"X-Q. You have said, at one time, have you not, that the Hobart car was in its right lane, in the center lane, have you not? A. I said the right lane.

X-Q. Was it in its right lane? A. Yes, that's right.

"X-Q. And that, at the time of the collision? A. No, not at the time of the collision."

Joseph Mullaney, a co-employee of O'Brien who was riding with him in the truck, testified that he was looking out the window to his right and did not see the Hobart automobile prior to the moment of impact. But he did state that "there was a crash" and the truck swerved to the left, throwing O'Brien on his lap.

Whitney, who was traveling some distance behind Hobart, on direct examination stated that Hobart was driving in the center lane at the time of the collision and that the O'Brien track, traveling with the two left wheels in the center lane drove into the Hobart automobile. However, on cross-examination he stated that the Hobart automobile turned to the left immediately prior to the accident, and that the collision occurred as it was turning.

Whitney's wife, who was riding with her husband, testified on direct examination that the O'Brien truck came into the center lane and hit the Hobart automobile, but, on cross-examination, she could not say whether the Hobart automobile turned or did not turn to the left at any time.

In addition to these eye-witnesses there was testimony from three state police officers who testified and submitted photographs as to the location and condition of the vehicles immediately following the accident and as to statements made by the parties at that time; the superintendent of the Concord Water and Sewer Department who described the nature of the construction and obstructions on the highway on that date; and an array of medical witnesses.

The rulings of the trial court and the evidence will be further developed in discussing the errors asserted by the appellant, which we now proceed to consider.

Mass. Ann. Laws c. 152, § 15 (1949), in pertinent part, provides:

> "* * * Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but, except as hereinafter provided, not against both. If compensation be paid under this chapter, the insurer may enforce in the name of the employee or in its own name and for its own benefit, the liability of such other person, and if, in any case where the employee has claimed or received compensation within six months of the injury, the insurer does not proceed to enforce such liability within a period of nine months after said injury, the employee may so proceed. * * * * * * * An employee shall not be held to have exercised his option under this section to proceed at law if, at any

time prior to trial of an action at law brought by him against such other person, he shall, after notice to the insurer discontinue such action, provided that upon payment of compensation following such discontinuance the insurer shall not have lost its right to enforce the liability of such other person as hereinbefore provided. * * * "

O'Brien, after filing his complaint on June 26, 1953, entered into an agreement on August 8, 1952 with his employer's insurer whereby the insurer agreed to pay him the benefits provided by the Massachusetts Workmen's Compensation Act for the injuries received in the accident. Accordingly, O'Brien received weekly payments, effective retroactively to June 23, 1952, until July 24, 1951 when his case was closed under a lump sum payment.

It was stated to the district judge at trial that upon O'Brien's agreement to receive workmen's compensation benefits, a duly authorized agent of the insurer "stated that he then wanted Mr. Nitkin [O'Brien's counsel] to understand that they were to be subrogated to the O'Brien case, which was then pending in the Federal Court and that he then wanted Mr. Nitkin to handle the case from then on on behalf of [the insurer] and as their attorney and that in due course if and when any moneys were received as a result of the case * * * the moneys were to be divided in accordance with Chapter 152, Massachusetts General Laws." It was further stated by an officer of the insurer "that no further actions of any kind of nature by way of new suits or new claims or other types of legal proceedings other than whatever may be necessary by way of appealing this case [will be taken by the insurer] against Dr. Hobart or against Mrs. Hobart."

Hobart unsuccessfully moved for summary judgment on October 13, 1954, claiming that under § 15 the insurer could not take over the action instituted by O'Brien. He contends in this connection that under § 15 O'Brien, upon agreeing to receive compensation benefits, had to discon-

tinue his action, that for a period of nine months after the injury the right to bring the cause of action rested in the insurer, and that O'Brien could commence the action again only if the insurer had not brought suit within the nine month period. If Hobart were to prevail in his argument that the insurer had no right to take over this action by agreement, but, rather, could only institute an action after discontinuance by O'Brien, he can escape liability altogether since the one year statute of limitations has run on the original cause of action. See *Broderick's Case*, 320 Mass. 149, 67 N.E.2d 897 (1946).

Initially we note that "Section 15 should be construed liberally to accomplish the purposes for which it was enacted." *Furlong v. Cronan*, 305 Mass. 464, 468, 26 N.E.2d 382, 385 (1940). Accordingly, it seems to us that the provision that an employee, in electing to receive compensation benefits, must discontinue prior to trial any action at law for the same injury, was not intended to aid the third party in escaping liability; rather, it was inserted to preserve the insurer's right of action against that third party. Here the insurer could have brought at the time O'Brien agreed to take compensation benefits, a new action against the third party, Hobart, since the statute of limitations had not run, as it had in *Broderick's Case*; instead it agreed to take over the action already commenced by O'Brien. By such agreement the insurer efficiently pursued its right of action under the statute with no prejudice resulting to Hobart.

However, Hobart would have us construe § 15 as requiring the discontinuance of the action initially brought by O'Brien, as a condition precedent to recovery from him, the third party wrongdoer. We reject this narrow construction for we believe that whether or not the insurer compelled O'Brien to comply with the formality of discontinuance, as it had a right to do under the statute, is not a matter that should work to the advantage of

Hobart in any way. As was said in *Becker* v. *Eastern Massachusetts St. Ry. Co.*, 279 Mass. 435, 441, 442, 181 N.E. 757, 759, 760 (1932):

> "The legal liability of a third person for an injury suffered by an employee is not created by the Workmen's Compensation Law and is not discharged by the employee's election to proceed against the insurer for compensation. The statute merely makes a transfer to the insurer of the employee's right to enforce such liability effective upon such insurer's paying compensation to the employee. The insurer, after such transfer, becomes, in substance, an assignee of the employee's cause of action. * * *. As in the ordinary case of an action at law brought in the name of an assignor of a cause of action, it is immaterial to the defendant whether the plaintiff is the real party in interest or a nominal plaintiff suing for the benefit of another. * * *
>
> "The defendant's only justifiable interest in the question whether the plaintiff is a nominal or real party is in being protected against double liability and not being required to defend an action prosecuted without authority. * * *."

The statements of O'Brien's counsel in open court, set forth above, and the concurrence therein by the insurer enabled the trial judge to see that Hobart was protected against double liability and that his rights were not prejudiced in any way. *Becker* v. *Eastern Massachusetts St. Ry. Co.*, *supra*. Moreover, the trial judge was the one to hear and determine the question of the authority of the insurer to prosecute an action at law in the name of the employee. *In re Nealon's Petition*, 1956 A.S. 650, 134 N.E.2d 886 (1956); *Becker* v. *Eastern Massachusetts St. Ry. Co.*, supra.

Since Hobart was not prejudiced by the insurer taking over O'Brien's cause of action, the trial judge properly allowed the insurer to continue the prosecution of the instant case notwithstanding that O'Brien had not discontinued his action. None of the cases cited by Hobart

in support of his argument present the exact problem before us, and we do not read anything in them that directly opposes our holding.

Next, Hobart contends it was error for the trial court to deny his motions for directed verdict and for judgment n.o.v. on the grounds that the evidence either failed to show negligence chargeable to him or that it showed contributory negligence as a matter of law, chargeable to O'Brien. He cannot prevail in this contention.

The principles which govern the consideration of motions for directed verdicts and judgments n.o.v. filed by defendants are stated in *American Fidelity & Casualty Company* v. *Dreyer*, 229 F.2d 930, 932, 933 (5 Cir. 1955):

> "* * * In determining whether or not the evidence in a given case is sufficient to take the case to the jury over a motion for directed verdict, the evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him which may be fairly drawn. It is not for the court to weigh the conflicting evidence or to judge the credibility of witnesses. Whenever the evidence is such that intelligent men may draw different inferences therefrom and reasonably disagree as to what the verdict should be, the matter is one for the jury. 'And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.' Lavender v. Kern, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916."

Applying these principles, it is apparent, we believe, from the mere summary of the testimony of the eyewitnesses, set forth above, that there was evidence in this case which would warrant a finding for the appellee. To the extent that there was conflicting evidence, the value of which depended on the credibility of the various witnesses, it presented a question for the jury. *Collins* v. *Neal*, 219 F.2d 288 (7 Cir. 1955). In this respect, Hobart's

confusion in describing the collision may have worked against him in the minds of the jury.

The jury could have found from the evidence that O'Brien at all times remained on the right side of the road and that Hobart turned to the left, thus causing the collision. This finding would be supported by O'Brien's testimony as well as portions of Whitney's testimony on cross-examination. Similarly, on the issue of contributory negligence the jury could have believed O'Brien's testimony that he was on the proper side of the road and in control of his vehicle. See *Merchants Motor Freight* v. *Downing*, 227 F.2d 247 (8 Cir. 1955). Nor do we believe that the pictures of tire marks and positions of the vehicles after the accident constitute physical facts which flatly contradict and therefore nullify the oral testimony. *Collins* v. *Neal*, supra.

Hobart, both as defendant and plaintiff, also moved for a new trial on the ground, among others, that the verdicts were against the law and evidence. Our views presented above insofar as pertinent apply equally well to these motions. In addition, we wish to state that "[a] motion for new trial is addressed to the sound judicial discretion of the trial court and the action taken thereon is not open to review on appeal unless it appears that there was an abuse of such discretion." *Thiringer* v. *Barlow*, 205 F.2d 476, 478 (10 Cir. 1953). There was no abuse of discretion in the denial of the motions in these cases.

Another ground for Hobart's motion for a new trial in these cases was that the verdict was influenced by wholly improper argument of appellees' counsel. In pursuing this contention on appeal, Hobart largely points to statements made by O'Brien's counsel in his summation to the jury and in a few instances to statements made by appellees' counsel during the course of the trial. Without conceding that the remarks in question exceeded the bounds of propriety, we believe that Hobart cannot resort to them on

appeal due to his failure to take timely objections to any of these statements at trial. See *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F.2d 290 (5 Cir. 1954), cert. denied 348 U.S. 875 (1954). In the absence of such objections the remarks of appellees' counsel are not available to him as grounds for reversal. Furthermore, it should be stated herein that during the trial the judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks of counsel for both sides.

Now we consider the rulings of evidence by the trial court which Hobart assigns as error. To a great extent these rulings are pertinent to both cases on appeal and we do not think it necessary to designate the particular relevance of each ruling.

Since the rulings generally deal with the admissibility or inadmissibility of particular items of proof, it is advisable to point out that Fed. R. Civ. P. 43(a) provides in pertinent part:

> " * * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. * * * "

First, Hobart asserts that it was error for the trial court not to allow him to present on cross-examination of O'Brien the complete details concerning statements made by O'Brien in a criminal proceeding in Concord District Court shortly after the accident.

On August 14, 1952 O'Brien had testified in Concord District Court that he did not see the Hobart automobile

in sufficient time to tell whether it was in his lane or in its own lane. At the trial of the instant case his testimony, as outlined earlier in this opinion, was to some extent inconsistent. For obvious reasons Hobart sought to confront O'Brien with this testimony on cross-examination.

The trial judge, after first refusing to allow in evidence anything concerning the August 14 testimony, later changed his mind and ruled that any statements made by O'Brien on that date could come in; further, he ruled that Hobart could identify the testimony by referring to the date when it was given and that it was made under oath and pains and penalties of perjury. However, he would not permit Hobart to state that it was made in the Concord District Court. Later, counsel for O'Brien conceded that Hobart could refer to "Concord" as the place where O'Brien gave the testimony.

The trial court's exclusion of the term "District Court" was based on the fact that since the ultimate disposition of the criminal proceeding in the Concord District Court "did not constitute a record of conviction that would be admissible" in the instant trial it would be prejudicial error to allow the jury to learn of the criminal proceeding.[1] In this connection he feared that the jury, upon learning that the testimony was given in the Concord District Court, might infer that O'Brien was involved in a criminal proceeding in that court. If the term "District Court" would result in such an inference, it is apparent that Hobart by indirection would be presenting to the jury a fact that could not otherwise be shown.

Upon the trial court's exclusion of the term "District Court", Hobart objected and, for reasons we cannot under-

[1] The inadmissibility of the ultimate finding of the Concord District Court and of the fact that there was a criminal proceeding was conceded by all counsel at the trial.

stand, refused to confront O'Brien with any portion of the Concord District Court testimony. Of course, his choice "to risk all" on this point cannot aid him on appeal. He has waived his right to confront O'Brien with an allegedly contradictory statement, as limited by the trial judge, and the issue before us is merely the one of whether the trial court's exclusion of "District Court" in these circumstances constitutes prejudicial error.

To support his argument Hobart cites many cases for the proposition that a trial court is under no obligation to protect a witness from being discredited on cross-examination. e.g. *Alford* v. *United States*, 282 U.S. 687 (1931). We think that this rule exists only as conditioned by the well established principle that the limits of cross-examination rest in the sound judicial discretion and control of the trial judge. See *United States* v. *Lawinski*, 195 F.2d 1 (7 Cir. 1952); *Davis* v. *Hotels Statler Co.*, 327 Mass. 28, 97 N.E.2d 187 (1951).

The trial judge's cautious exercise of discretion in this matter is understandable in light of the aforementioned rule that if evidence, which tends to show that a party has been exposed to a criminal prosecution as a result of a motor vehicles accident, is erroneously admitted in a civil action arising out of the same accident under circumstances where there was no "conviction" which can be shown as a matter of record, such error is prejudicial and not cured by a statement in the charge instructing the jury to disregard the fact of the criminal prosecution. See *Kagasck* v. *Bockus*, 293 Mass. 371, 199 N.E. 726 (1936).

Although we are not convinced that the jury necessarily would have inferred from the term "District Court" that O'Brien was involved in a criminal proceeding, upon weighing the interests in conflict here—the possibility of prejudice to O'Brien as opposed to the evidentiary value to Hobart—we cannot say that the trial court abused its discretion in excluding the term "District Court." Neither

do we believe, in light of the record, that this exclusion constituted prejudicial error since Hobart was afforded the opportunity to offer this testimony both for purposes of impeachment and as admissions, to show that the answers were made by O'Brien at a hearing under oath and under the pains and penalties of perjury and the date when such testimony was given. Indeed, the trial court was willing to permit the court stenographer to testify that these answers were made under oath by O'Brien at a hearing in her presence.

Certainly this is not a situation where the trial court's exclusion rendered the remainder of the evidence unintelligible to the jury. See *Commonwealth* v. *Catalda*, 326 Mass. 373, 94 N.E.2d 761 (1950); *Commonwealth* v. *West*, 312 Mass. 438, 45 N.E.2d 260 (1942). Moreover, we believe that those circumstances surrounding the contradictory testimony which were allowed by the trial court would have been sufficient to recall the particular occasion to the mind of the witness, O'Brien, if Hobart had confronted him with said testimony.

We conclude that no prejudicial error was committed by the trial court on this ruling.

The second ruling of the trial court assigned as error is the admission of certain testimony during the cross-examination of John H. Robinson, a witness for Hobart, concerning a prior statement he had made about the accident. The record, quoted below, shows that the trial court admitted this statement only for the purpose of impeaching credibility and that Hobart's counsel consented to the court's ruling:

> "The Court: You have no objection if it is admitted for the purpose of impeaching credibility?
> [Appellant's counsel] "Mr. Mahony: Impeaching credibility. I certainly do not.
> "The Court: Confine it to that.
> [Appellee's counsel] "Mr. Prendergast: Confine it to that. All right, thank you."

Now Hobart states in his brief that his counsel said "I certainly do" and not "I certainly do not," claiming that the record is in error. O'Brien, on the other hand, states that the record is correct. Under such circumstances we must abide by the record as it stands. If the record were in error, Hobart should have taken measures to correct it before submitting it on appeal. Absent such correction, we conclude that Hobart did not save his rights on this point.

The third ruling assigned as error by Hobart is the trial court's exclusion of his offer in evidence of a declaration filed by O'Brien in another action in Middlesex Superior Court brought by him against Robert Whitney, whose automobile was also involved in the accident, to recover for the same injuries for which the instant action was brought. In that declaration "the plaintiff [O'Brien] claimed that the defendant [Whitney] so negligently and unskillfully drove a motor vehicle on a public highway called Route 2, Concord, Mass., on the 21st day of June, 1952, and by reason thereof said motor vehicle struck the motor vehicle in which the plaintiff was then properly riding along said highway, and as a consequence of which the plaintiff was seriously and permanently injured." Hobart offered this declaration for the purpose of impeaching O'Brien's testimony in the instant trial where he stated that he saw Whitney's car on an incline about 800 feet away and did not see it again before the collision. Prior to this offer the trial court had permitted Hobart to confront O'Brien in cross-examination with certain answers he had given to interrogatories propounded in the Whitney action.

We cannot see any inconsistency between the O'Brien declaration, set forth above, in the Whitney action and his testimony at the instant trial and on that ground alone would affirm the trial court on its exclusion. But, even conceding some innate inconsistency between these two

statements, the declaration in the Whitney action would not be admissible. For a conventional declaration or formal allegation of negligence, such as we have here, "belongs to that class of formal statements which, in the absence of further proof, are assumed to have originated with counsel rather than to the class of statements of particular fact which can be inferred to have originated with the client himself."[2] *Jennings* v. *Bragdon*, 289 Mass. 595, 194 N.E. 697, 698 (1935). There exists no proof in this case that the statements in the declaration originated with O'Brien or were adopted by him.

Finally, Hobart contends that in light of 62 Stat. 957, 28 U.S.C. § 1961 (1952)[3] it was error for the trial court to deny his motion to strike the item of pre-judgment interest calculated from the date of the writ. This argument invites but brief consideration in view of the detailed treatment given this general problem by this court in *Sylvania Electric Products* v. *Barker*, 228 F.2d 842 (1 Cir. 1955), cert. denied 350 U.S. 988 (1956), *Moore-McCormack Lines* v. *Amirault*, 202 F.2d 893 (1 Cir. 1953) and by the Fifth Circuit in *New Amsterdam Casualty Co.*

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[2] For cases where it was held that the attorney was presumably acting under special authorization of his client because the statements set out a specific cause of action or defense, see *Johnson* v. *Russell*, 144 Mass. 409, 11 N.E. 670 (1887), *Clarke* v. *Taylor*, 269 Mass. 335, 168 N.E. 806 (1929). See also *Frank R. Jelleff, Inc.* v. *Braden*, 233 F.2d 671, 676 (D.C. Cir. 1956), where the other complaint "spoke specifically of the very garments involved in the present action."

[3] "§ 1961. *Interest*

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. (June 25, 1948, c. 646, § 1, 62 Stat. 957.)"

v. *Soileau*, 167 F.2d 767 (5 Cir. 1948), cert. denied 335 U.S. 822 (1948).

These cases make it quite clear that, where, as here, the injury giving rise to the cause of action occurred in Massachusetts, and the federal court obtained jurisdiction through diversity, the substantive law to be applied by the district court is the law of Massachusetts. Mass. Ann. Laws c. 231 § 6B (1956), providing for interest from the date of the writ, is a part of that substantive law.

We have considered other arguments advanced by Hobarr as plaintiff-appellant and defendant-appellant, such as his argument that the damages were excessive, only to reject them as without merit. We do not think they call for separate discussion.

Judgments will be entered affirming the judgments of the district court.

JUDGMENT

McCarthy, D. J.

This cause having come on for trial before the court and a jury and the jury having rendered a verdict for the Plaintiff in the sum of sixty-one thousand dollars ($61,000.00), it is hereby

Ordered that judgment be and is hereby entered for the Plaintiff in the sum of sixty-one thousand dollars ($61,000.00) with interest thereon from June 26, 1952 to date in the sum of twelve thousand six hundred seventy-seven dollars and eighty-three cents ($12,677.83) and for his costs taxed at $

Dated at Boston this thirteenth day of December, 1955.

By the Court,

(s) David W. Walsh
Deputy Clerk

(s) William T. McCarthy
United States District Judge

MEMORANDUM ON MOTION FOR NEW TRIAL OR FOR JUDGMENT N.O.V. FILED BY THE DEFENDANT.

July 2, 1956.

McCarthy, D. J.

I have carefully studied the briefs filed by the parties in this case and have given thoughtful consideration to all the issues raised by these motions and the rights which were saved during the trial. It is my considered judgment that the motion for judgment n.o.v. is denied and the motion for a new trial filed by the defendant is denied upon the condition, however, that the plaintiff remit to the defendant the sum of $13,000. If this remittitur is not filed within twenty days of the entry of this order, then the order of the Court is that the motion for a new trial filed by the defendant is granted as to the issue of damages only.

PLAINTIFF'S REMITTITUR

Now comes the plaintiff in the above-entitled action and hereby remits to the defendant the sum of thirteen thousand ($13,000.00) dollars, in accordance with Order of the Court made on July 2nd, 1956.

(s) Michael P. O'Brien
Michael P. O'Brien, *Plaintiff*

By (s) Reuben H. Nitkin
By virtue of Power of Attorney dated December 13, 1955, copy of which is attached hereto.

AMENDED JUDGMENT

McCarthy, D. J.

After hearing upon defendant's motion to vacate judgment and in accordance with the memorandum of the Court dated June 26, 1957, it is hereby

Ordered judgment dated December 13, 1955, be and hereby is vacated and execution issued thereon be returned into this Court and

Further Ordered judgment be and is hereby entered for the plaintiff in the sum of Forty-eight Thousand Dollars ($48,000.00) with interest thereon from June 26, 1952, to December 13, 1955, in the sum of Nine Thousand Nine Hundred and Seventy-four Dollars and Forty Cents ($9,974.40) and for his costs taxed at $, and it is

Further Ordered that execution issued on this amended judgment shall be in the sum of this judgment less any partial satisfaction endorsed on the execution issued on the original judgment which execution has been returned into Court.

By the Court,

/s/ John B. Mcnulty, Jr.
Deputy Clerk

(s) William T. McCarthy
United States District Judge

Dated at Boston June 27, 1957.

Office - Supreme Court, U.S.
FILED
SEP 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 272

HAROLD HOBART,
Petitioner,
v.
MICHAEL P. O'BRIEN,
Respondent,

and

HAROLD M. HOBART,
Petitioner,
v.
JOHN G. DONOVAN, ET AL.,
Respondent.

REPLY BRIEF

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In The

Supreme Court of the United States

October Term, 1957

No. 272

Harold Hobart,

Petitioner,

v.

Michael P. O'Brien,

Respondent;

Harold M. Hobart,

Petitioner,

v.

John G. Donovan, et al.,

Respondent.

REPLY BRIEF

Preliminary Statement

Counsel for Respondents in the "Preliminary Statement" of their "Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit", have referred to a small part of the testimony of the witnesses, Hobart, O'Brien, and Whitney, as same was given at the trial in the United States District Court for the District of Massachusetts. The purpose of said references to said testimony of said witnesses is obviously an effort to strengthen the position taken by counsel for Respondents (as testified to by the witness O'Brien, pages 61 & 62 of the Consolidated Rec-

ord Appendix), to the effect that Dr. Hobart's car veered to the left and that the left front of Dr. Hobart's car ran into the rear of the left front wheel of the truck driven by Mr. O'Brien.

As in the Courts below, counsel for Respondents have made much of the fact that Dr. Hobart was first called to the stand by his opponents, that he was honestly mistaken under pressure of examination, which in fact amounted to cross-examination, in saying that the right bumper of the truck driven by Mr. O'Brien hit the left front bumper of Dr. Hobart's car (pg. 273, Consolidated Record), and that later he changed his testimony, and stated that it was the left side of the truck that collided with the left side of his automobile (pg. 439 of the Consolidated Record). Counsel for the litigant, Hobart, at the trial in the United States District Court for the District of Massachusetts could very well have cross-examined Dr. Hobart after his opponents had called him to the stand in their case in chief. In doing so, they could very easily have caused him to bring out the way that this accident actually happened. Counsel for Respondents continue to attempt to uphold an outrageous judgment on the ground that when they called Dr. Hobart to the stand he made a mistake in testifying as to how the accident happened and that, in their opinion, their opponents made a mistake as a matter of trial strategy in waiting until Dr. Hobart was called as a witness for himself to state how this accident actually happened.

A smattering of the testimony of three witnesses cannot possibly give the picture of how this accident happened to this Honorable Court. There are six witnesses who testified at the trial of this case who were actually present at the collision in question (as referred to on page 8 of the Petition for Writ of Certiorari filed herein). The testimony of the police officers who investigated this collision, as referred to in pages 22 and 23 of said Petition

for Writ of Certiorari, is also tremendously important. The pictures of the vehicles and the roadway after the accident make it conclusive that a terrible miscarriage of justice has taken place in the case which is the subject of this Petition for Writ of Certiorari.

The following points are worthy of some consideration with regard to the accuracy of the Preliminary Statement in the Brief in Opposition to Petition for Writ of Certiorari.

Dr. Hobart, in describing the accident did not testify that he was travelling 25 to 30 miles an hour. His testimony as set forth on pages 439 and 440 of the Consolidated Record Appendix, was to the effect that when he first saw the truck driven by Mr. O'Brien, his automobile was travelling at a speed which he would judge to have been about 30 miles an hour, but that at the time of the accident his automobile, according to his best estimate, was going at a speed of only 5 miles an hour.

Pages 401 and 402 of the Consolidated Record Appendix sets forth the testimony upon which counsel for Respondents have drawn the conclusion that the witness Whitney "stated that the Hobart automobile turned to the left immediately prior to the accident and that the collision occured as it was turning". Mr. Whitney testified that Dr. Hobart's vehicle did not move out of the center lane up until the time that the accident happened. Other testimony from which the aforestated conclusion is reached resulted from Mr. Whitney saying "Yes Sir" to leading questions as a result of pounding cross-examination.

Argument

Re: Question 1.

DEROGATORY COMMENTS BY COUNSEL FOR MR. O'BRIEN AT TRIAL AS TIED IN WITH DEROGATORY COMMENTS IN CLOSING ARGUMENT.

It is respectfully submitted that it is not at all unfair for counsel for Petitioner to take the position that this Honorable Court should grant a reversal and a new trial on the ground that derogatory comments were made by counsel for Mr. O'Brien directed against Mr. Mahoney, of counsel for now Petitioner, at the trial in the United States District Court for the District of Massachusetts, and that said comments were tied in with those of a similar nature made in closing argument by counsel for now Respondents. The petition filed herein does not contend that verbal arrows were being hurled constantly. The contention of counsel for Petitioner is that the arrows which were hurled added up to an effort to make the jury believe that they could not trust so learned and honorable a gentleman as Mr. Mahoney.

The fact that counsel poked fun at each other regarding the close of the working day at 4:00 o'clock was separate and apart, it is respectfully submitted, from reference to "not telling the truth," "sneaking in words you never dreamed of," and "twisting the facts." Again, it is respectfully submitted that it is significant that the first two references to Mr. Mahoney that were made during the taking of testimony in the case and that the latter comment was made in closing argument, all as referred to on pages 4 and 5 of the Petition For a Writ of Certiorari filed in this Honorable Court.

It is respectfully submitted that the cases quoted on page 6 of Respondents' Brief in Opposition to Petition for Writ of Certiorari are far from compelling with regard to the case which is the subject of this petition.

The case of *Stanczak v. Pennsylvania Railroad Company*, 174 F. (2d), 43 (7th Cir.), involved a juror who had not given a truthful statement on voir dire examination. The United States Court of Appeals said that the record was not convincing that the juror's error was intentional. After the quotation set forth on page 6 of the Brief in Opposition to Petition for Writ of Certiorari from said case, the United States Court of Appeals for the 7th Circuit added the following:

> "The Court (meaning the trial court) did not abuse its discretion in overruling the Motion for a New Trial on the ground that the juror answered untruthfully on his voir dire".

It is respectfully submitted that there is no basis of comparison between a case involving a misstatement by a juror and a contention in a case regarding derogatory comments by counsel.

The case of *Union Electric Light and Power Company v. Snyder Estate Company*, D. C. 15, F. Supp. 379, involves a juror who was excused after which it developed that said juror was not the one who had been summoned but was in fact the brother of the one who had been summoned. Both the trial judge and counsel for both sides knew about this and no objection was taken. Again we have a far cry from law regarding the point now under consideration.

The U. S. Court of Appeals for the 5th Circuit held in the case of *Louisiana and Arkansas Railway Co. v. Johnson*, 214 F. (2d), 290, (5th Cir., 1954) *cert. den.* U. S. 875 (1954), that:

> "We have carefully examined the record in this case, and, while it may be that the learned District Judge at times showed some impatience or irritation with the claim of total defense which did not exist at point of law, we are further impressed with his fairness and we cannot sustain appellant's contention that its case was prejudiced by any claimed unfair manner in which the trial was conducted".

Thereupon, the quotation found at the bottom of page 7 of the Brief in Opposition to Petition for Writ of Certiorari was set forth. It is true that in the case of *Louisiana and Arkansas Railway Co. v. Johnson, supra*, the trial court had overruled an objection to argument of counsel for the plaintiff at the trial in the United States District Court. It is respectfully submitted that remarks made by counsel in said case could not possibly have had the same effect upon the jurors or the same degree of seriousness as a matter of law as did the derogatory comments by Mr. Prendergast which are the subject of present considerations.

The problem in the case which is the subject of this petition is that the comments regarding counsel for Dr. Hobart as tied in with similar comments during the closing argument by Mr. Prendergast, were such as to preclude Dr. Hobart from having a fair trial. The case of *London Guarantee and Accident Co., Ltd. v. Woolfe*, 83 F. (2d) 325, (8th Cir.), is a good example of a reversal by reason of improper and prejudicial argument to a jury. In said case on page 344, the Court of Appeals for the 8th Circuit refers to the case of *New York Central Railway Co. v. Johnson*, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706, in which this Honorable Court dealt with the matter of attacks upon opposing counsel. In said case Mr. Justice Harlan F. Stone made it clear that the public interest requires that litigation be fairly and impartially conducted and that it is the duty of the trial judge to protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice. It is respectfully submitted that the comments by Mr. Prendergast regarding Mr. Mahoney precluded Dr. Hobart, as Mr. Mahoney's client, from the fair trial to which Dr. Hobart was entitled.

Re: Question 2.

ARGUMENT OF COUNSEL WHICH WAS OUTSIDE OF SCOPE OF EVIDENCE.

Counsel for Respondents, in making the statement "there was no argument of counsel for O'Brien which was outside the scope of the evidence", apparently do not understand or do not want to understand the contention made in the Petition for Writ of Certiorari to the effect that Mr. Prendergast in his closing argument quoted alleged testimony from the witness Robinson which, in fact, was not brought out in the trial of this case. Counsel for Petitioner believes that the fact that Mr. Prendergast's argument was outside of the scope of the evidence is clearly brought out on pages 16, 17 and 18 of the Petition for Writ of Certiorari filed in this Honorable Court.

Instead of denying the contention of counsel for Petitioner to the effect that Mr. Prendergast's argument was outside of the scope of the evidence, counsel for Respondents, in the Brief in Opposition to Petition for Writ of Certiorari, take the position that since counsel for Dr. Hobart did not raise the issue at trial same cannot be raised after trial.

It is respectfully submitted that it is entirely possible for counsel in the trial of a case to miss the full purport of remarks made in closing argument by one's opponent, but that if such statement is tremendously damaging to the litigant and if such statement is outside the scope of the evidence, same should be the basis of a reversal and new trial. This is particularly true where such arguments are calculated to arouse the passions and prejudices of the jury as was undoubtedly the case in the reference by Mr. Prendergast to the alleged testimony of the witness Robinson.

It is respectfully submitted that the cases referred to on page 2, of the Brief in Opposition to Petition for Writ of Certiorari do not overcome the fact that reference was

made to evidence allegedly introduced at trial by the witness, Robinson, which in fact was not so introduced. The same comments which are made in the prior point with regard to the case of *Louisiana and Arkansas Railway Co.* v. *Johnson, supra,* are applicable here. The case of *Thompson* v. *Bowles,* 123 F. (2d) 487, (8th Cir. 1941) *cert. den.* 315 U. S. 804, relies upon the case of *London Guarantee and Accident Co.* v. *Woelfle, supra.,* which said latter case relies upon the case of *New York Central Railway Co.* v. *Johnson, supra,* decided by this Honorable Court. The law regarding the issues of misconduct of counsel therefore narrows down to the question as to whether the litigant received a fair trial. Most assuredly the misquoting of alleged evidence in closing argument precluded Dr. Hobart from fairly and impartially conducted litigation.

In the case of *Dowell, Inc.* v. *Jowers,* 5 Cir. 182 F.2d 576, the United States Court of Appeals dealt with the question of allegedly prejudicial remarks made by the trial judge instead of the closing argument of counsel. It is respectfully submitted that said case does not furnish any justification or excuse for Mr. Prendergast having misquoted alleged evidence by the witness Robinson nor change the law as established by *New York Central Railway Co.* v. *Johnson, supra.*

Re: Question 3.

ARGUMENT OF COUNSEL INTENDING TO INCITE THE SYMPATHIES AND PREJUDICES OF THE JURORS.

It is respectfully submitted that a reading of the argument by Mr. Daley as set forth on page 500 of the Consolidated Record, and that part of the argument of Mr. Prendergast as set forth on pages 513, 514, and 515 of the Consolidated Record, constitutes arguments and comments by counsel calculated to arouse the passions and

prejudices of the jurors by presenting to them questions extraneous to the evidence.

The law regarding this point, it is respectfully submitted, is also governed by those principles set forth in the case of *New York Central Railway Co. v. Johnson, supra.*

Re: Question 4.

VERDICT OF JURY HAVING BEEN CONTRARY TO THE EVIDENCE AND TO THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

Counsel for Respondents have again referred to the testimony of only the witnesses Hobart, O'Brien, and Whitney in an effort to justify the conclusion which they submit to this Honorable Court, in the last paragraph on page 13 of their brief, to the effect that the jury was warranted in finding Dr. Hobart negligent and Mr. O'Brien free from contributory negligence.

Even at the expense of repitition, it must be said, in behalf of Dr. Hobart, that this case can only be understood when the testimony of all witnesses is read and the same tied in with the physical facts. Such a study brings one to the inescapable conclusion that Mr. O'Brien was at least guilty of such contributory negligence as to preclude him from being entitled to any recovery in this case.

In the Petition for Writ of Certiorari, under the argument regarding this point, it has been fully pointed out how utterly unworthy of belief is the story told by Mr. O'Brien to the effect that Dr. Hobart's car ran into the rear of the left front wheel of the truck driven by Mr. O'Brien. (Pages 61 and 62 of the Consolidated Record Appendix).

Again we are faced with the contention by counsel for Mr. O'Brien to the effect that Dr. Hobart should be

financially crippled by this enormous judgment because he first testified that it was the right front of Mr. O'Brien's truck which ran into his automobile. This was an obvious mistake which was later corrected. As stated hereinabove, counsel for Dr. Hobart could have taken him on cross-examination when he first appeared as a witness and straightened out this matter. It is most respectfully urged that the fact that a witness called by his opponent becomes confused should not be the basis of an outrageous judgment when the composite whole of the testimony in the case conclusively shows at least contributory negligence on the part of the other party to a collision.

Again, counsel for Respondents rely on their great talent in having broken Mr. Whitney to the point where he believed that he saw Dr. Hobart's car turn to the left just as the accident happened. Counsel for Respondents do not mention that Mr. Witney steadfastly testified (as did all witnesses excepting Mr. O'Brien himself) that Mr. O'Brien's truck was over to the left of the line which defined the lane in which he should have been traveling. (Pages 394, 395, 396, 399 and 400 of the Consolidated Record Appendix.)

It is respectfully submitted that it was Mr. O'Brien's negligence, and his negligence alone, which was the true cause of this accident, but that, at least, his failure to drive in the proper lane under the circumstances of the excavations on the north side of the road was such contributory negligence as to definitely bring him within the law as quoted on pages 30, 31 and 32 of the Petition for Writ of Certiorari and to preclude him from any recovery in this case. It is respectfully submitted that the contributory negligence on Mr. O'Brien's part is so clear that it was an abuse of discretion for the trial judge to refuse to grant a new trial and for the United States Court of Appeals for the 1st Circuit, in turn, to uphold the judgment of the court below.

CONCLUSION

Counsel for Respondents contend that counsel for Petition has failed to present with accuracy, brevity and clearness any considerations warranting a further review. The record of this trial, as shown in Volume I of the Consolidated Record Appendix consists of 499 pages of testimony, conferences at the bench, arguments and instructions by the Court to the jury. Volume II of the Consolidated Record Appendix includes the pictures which were introduced at trial. From a sincere study of all of this material, counsel for Petitioner has brought to the attention of this Honorable Court the vital reasons why this Honorable Court should exercise supervisory powers and preclude the terrible miscarriage of justice which would result should the judgment in this case be allowed to stand. It is also true that a full understanding of the collision in question and the discrepancies at the trial can only be accomplished by a reading of the testimony of the witnesses, other than the medical witnesses, by a review of references to the various discrepancies which occurred at trial, and by tying in the verbal evidence regarding the collision with the pictures in Volume II of the Consolidated Record Appendix. It is respectfully submitted that upon such a study, your Honors can come to only one conclusion, namely, that the ends of justice require the granting of the Writ of Certiorari.

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Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 272.

HAROLD HOBART, *Petitioner*,

v.

MICHAEL P. O'BRIEN, *Respondent*,

AND

HAROLD M. HOBART, *Petitioner*,

v.

JOHN G. DONOVAN ET AL., *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Preliminary Statement.

This litigation arose out of a collision of a tank truck owned by respondent John G. Donovan, d/b/a The Utility Oil Company, and driven by his employee, respondent Michael P. O'Brien, and an automobile owned by Irma B. Hobart and driven by her husband, petitioner Harold M. Hobart, on Route 2 in Concord, Massachusetts, on June 21, 1952.

By a complaint filed June 26, 1952, respondent Michael P. O'Brien alleged that petitioner Harold M. Hobart negli-

gently drove a motor vehicle so that it collided with the motor vehicle being operated by Michael P. O'Brien. In a complaint filed May 8, 1953, petitioner Harold M. Hobart alleged that respondent John G. Donovan and his employee, respondent Michael P. O'Brien, negligently drove a motor vehicle on Route 2 in Concord, Massachusetts, against Harold M. Hobart, who was then driving on said highway. The two actions were consolidated for trial.

The record shows that in the early afternoon on June 21, 1952, Harold M. Hobart was travelling west on a section of Route 2 that comprised three lanes. As he approached the town line between Concord and Acton, approximately one quarter of a mile east of the scene of the accident, he observed indications of construction going on and found the northern lane obstructed by warning signs, dirt, materials and equipment. By reason of these obstructions he went into the middle lane. Travelling behind him some 50 feet was an automobile driven by Robert Whitney, a witness at the trial.

Michael P. O'Brien, driving a tank truck in the course of his duty as an employee of John G. Donovan, was travelling east in the southern lane of this highway. As Hobart and O'Brien approached and attempted to pass each other their vehicles collided. The truck and the automobile, as a result of this collision, ended up against a guard rail on the northern lane, Hobart's car facing south and the truck facing northeast.

Harold Hobart, in describing the accident, testified that he was travelling 25 to 30 miles per hour; that he at all times remained in the center lane and that, when the O'Brien truck was four or five car-lengths away, it left the southern lane and came into the center lane at an angle, and collided with his automobile. At one point in the trial Hobart said it was the truck's right bumper that hit his left front bumper. Later he changed this testimony, stat-

ing it was the left front side of the truck that collided with the left front side of his automobile.

The respondent Michael P. O'Brien testified that he was travelling approximately 25 miles an hour; that he was on the "right side" of the road and that the Hobart car came towards him, hitting the left front side of his truck. He further testified that the force of the collision pulled the wheel out of his hand and "swung the truck completely around," throwing him to the right side of the cab. On cross-examination he testified that the petitioner's car, at the time of the collision, was not in its right lane.

A witness, Whitney, who was travelling some distance behind Hobart, on direct examination stated that Hobart was driving in the center lane at the time of the collision and that the O'Brien truck, travelling with the two left wheels in the center lane, drove into the Hobart automobile. However, on cross-examination he stated that the Hobart automobile turned to the left immediately prior to the accident, and that the collision occurred as it was turning (Record, pp. 401, 402).

Argument.

QUESTION I. DEROGATORY COMMENTS BY COUNSEL FOR MR. O'BRIEN AT TRIAL AS TIED IN WITH DEROGATORY COMMENTS IN CLOSING ARGUMENT.

The petition (p. 3) complains that Mr. Prendergast made derogatory remarks concerning opposing counsel. It is a very easy thing to run through a 543-page transcript and pull from it individual remarks made by an attorney or a party, sew them together like a patchwork quilt, and make it appear that verbal arrows were being hurled constantly. This argument is grossly unfair.

The petitioner (p. 4) sets forth the following brief excerpts from the record:

> "Mr. Mahony: May I take a look at it?
>
> "Mr. Prendergast: Oh, sure (handing)—but you won't tell us the truth.
>
> "Mr. Mahony: Well, I do object to that.
>
> "The Court: All right counsel doesn't mean anything by that.
>
> "Mr. Prendergast: No, no, no."

The trial judge was in the best position to determine whether by-play of this sort would have any effect on the jury, and Mr. Mahony could not have worried about the matter much, because he never mentioned the remark again—never made a motion for mistrial, and was seemingly satisfied with Mr. Prendergast's admission that he was not serious in his statement.

At page 201 of the record, says the petitioner (p. 4), Mr. Prendergast made another derogatory remark to the effect that "You have to watch these fellows . . . They'll sneak in words you never were dreaming of."

The petitioner should have quoted the record a bit further on the same page where Mr. Mahony and Mr. Prendergast joked about Mr. Prendergast's workday beginning at four o'clock; then a true picture of the humorous spirit in which counsel were speaking would have been obtained.

Record (p. 201):

> "Mr. Prendergast: You have to watch these fellows, Mr. O'Brien. They'll sneak in words you never were dreaming of.
>
> "Q. How long would you stay?
>
> "A. Oh, 10 or 11 o'clock maybe later, until around 4.

"Mr. Mahony: Brother Prendergast says that would not be all day.

"Mr. Prendergast: Not to me.

"Mr. Mahony: Your day begins after four?"

At page 275 of the record we find that a question arose as to whose appearance had been filed in the case on behalf of the defendant when a certain deposition was taken. The names of other attorneys were mentioned. Finally Mr. Mahony said:

"I don't think Mr. Mahony's status is a fact, but I am in now."

Mr. Prendergast then joked:

"You are in, up to your neck."

What the petitioner does not state on page 4 of his petition is that the trial judge immediately said to the jury:

"You must disregard comments. They are made in the spirit of fun. We want to judge the case on the testimony."

In reference to the remark by the respondent's counsel in his argument that "; . . . I am sure if Mr. Mahony ever gets to the age Michael O'Brien is at and loses part of his lung, he will be the one big fellow to cry about it . . ."

This remark was retaliatory in character in that it was called for by the statements of Mr. Mahony in his argument to the jury belittling the damages which had been sustained by Mr. O'Brien in the accident.

The respondent submits that, if the petitioner made no complaint *in the course of the trial*, he should not be heard

to complain afterwards—just as in *Stanczak* v. *Pennsylvania R.R. Co.*, 174 F. (2d) 43 (7th Cir.), counsel for the appellant failed to object and "took a chance" on a reasonable verdict. At page 49 of 174 F. (2d) the Court of Appeals for the Seventh Circuit stated aptly:

> "..... The law is well established that a party cannot gamble with the possibility of a verdict and, thereafter, when the verdict proves unfavorable, raise a question he might have raised before verdict. Union Electric Light and Power Company vs. Snyder Estate Co., D. C., 15 F. Supp. 379."

See *Louisiana & Arkansas Railway Co.* v. *Johnson*, 214 F. (2d) 290 (5th Cir., 1954); cert. den. 348 U.S. 875 (1954).

QUESTION II. ARGUMENT OF COUNSEL WHICH WAS OUTSIDE THE SCOPE OF THE EVIDENCE.

There was no argument of counsel for O'Brien which was outside the scope of the evidence. Mr. Prendergast, in his argument to the jury, summed up the evidence of Mr. Robinson and others to the best of his ability. There was nothing said by Mr. Prendergast which was improper, and the argument in reference to Mr. Robinson was considered by the United States Court of Appeals in this case:

> Page 11, Opinion of the Court: "Another ground for Hobart's motion for a new trial in these cases was that the verdict was influenced by wholly improper argument of appellees' counsel. In pursuing this contention on appeal, Hobart largely points to statements made by O'Brien's counsel in his summation to the jury and in a few instances to statements by appel-

lees' counsel during the course of the trial. Without conceding that the remarks in question exceeded the bounds of propriety, we believe that Hobart cannot resort to them on appeal due to his failure to take timely objections to any of these statements at trial. See *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F.2d 290 (5 Cir. 1954), cert. denied 348 U.S. 875 (1954). In the absence of such objections the remarks of appellees' counsel are not available to him as grounds for reversal. Furthermore, it should be stated herein that during the trial the judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks of counsel for both sides."

Thompson v. *Bowles*, 123 F. (2d) 487 (8th Cir., 1941); cert. den. 315 U.S. 804.

At the conclusion of the charge the Court said (R. p. 538):

"Will counsel come up?"

"(Conference at the bench)

"The Court: Is there anything you want to say?

"Mr. Prendergast: No thank you, you did well.

"Mr. Buzzell (Associate counsel for Hobart) You did very well.

"The Court: I think I tried to be fair. Is that all right Mr. Mahony.

"Mr. Mahony: It is one of the best charges I heard you give."

"No objection was taken to any of the remarks complained of and we have no further occasion to consider such remarks. *Dowell, Inc.*, v. *Jowers* 5 Cir., 182 F. 2d 576 (579)."

The petitioner now contends that the argument by counsel for O'Brien tended to prejudice the jury against Hobart. This, it is submitted respectfully, is a pure afterthought on the part of the petitioner, an argument dreamed up after scanning the record when the trial had been completed and the verdict returned, and is entitled to no consideration.

In the whole record there is not *one* objection to the argument of counsel for Mr. O'Brien. Neither counsel for Hobart requested the Court to instruct the jury to disregard even one word uttered by counsel for O'Brien.

As in the *Stanczak* case, the respondent says that the trial Court was in a position to follow the arguments of counsel, observe the manner of counsel, and evaluate the effect upon the jury. His judgment that the arguments were not prejudicial and could not warrant a new trial should not be disturbed.

QUESTION III. ARGUMENT OF COUNSEL INTENDED TO INCITE THE SYMPATHIES AND PREJUDICES OF THE JURORS:

The respondent respectfully submits that this argument has been discussed heretofore under Question I and Question II.

QUESTION IV. VERDICT OF JURY HAVING BEEN CONTRARY TO THE EVIDENCE AND TO THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL:

The respondent respectfully submits that there is ample evidence of the petitioner Hobart's negligence.

The highway upon which this accident occurred, in June of 1952, consisted of three lanes, each approximately ten feet in width (R. p. 45). These lanes will be described hereinafter as the northerly, middle and southerly lanes.

Prior to the collision the vehicle driven by the plaintiff O'Brien had been operating in the southerly lane, travelling in an easterly direction. The vehicles driven by the defendant Hobart and the witness Whitney were headed west, and had been operated apparently in both the northerly and the middle lanes.

At about that point in the highway where the collision between the O'Brien and the Hobart vehicles occurred, the northerly lane was obstructed at certain points by mounds of earth (R. p. 2[illegible], Defendant Hobart, called by the plaintiff as witness in direct examination; p. 59, Plaintiff O'Brien).

Mr. O'Brien was driving behind a small delivery truck which had a box in the back of it. The box was bouncing about in the truck. Mr. O'Brien was driving at a rate of speed somewhere in the vicinity of twenty-five to thirty miles an hour, in a residential district, approaching the Acton-Concord line (R. p. 58). He saw the Hobart and Whitney vehicles some distance away, but noticed nothing unusual about their speed (R. p. 60). As he was driving along in the southerly lane he saw the Hobart car change its course, come to its left (R. p. 61), and the left front of the car came in contact with the left front wheel of the Utility Oil truck which Mr. O'Brien was driving (R. p. 61). The steering wheel of the truck was pulled from the plaintiff's hands, and the plaintiff was thrown down in the cab (R. p. 62).

First, with respect to the testimony of the plaintiff O'Brien, he stated that he was following the delivery truck with the box on the back of it, and suddenly the Hobart car came over to its left and struck O'Brien's truck on the rear of the left front wheel (R. p. 61). Mr. Mahony, cross-examining the plaintiff, tried his best to "shake" the plaintiff on his version of the accident. At page 86 of the record the following is found:

"X-Q. You have said, at one time, have you not, that the Hobart car was in its right lane, in the center lane, have you not? A. I said the right lane.

"X-Q. Was it in its right lane? A. Yes, that's right.

"X-Q. And that, at the time of the collision? A. *No, not at the time of the collision*." (Emphasis supplied.)

Contrary to the contention of the defendant, therefore, Mr. O'Brien certainly did state that the Hobart car abandoned the course it should have followed, and came across the road to strike his vehicle.

Mr. Mullaney, it is true, did not see the Hobart or Whitney cars prior to the moment of impact, but he stated that the truck swerved to the left after the impact, when the respondent landed partly on his lap.

An examination of the record of the testimony of Doctor Hobart reveals that he was thoroughly confused about the manner in which the accident happened. He was first called to testify by the plaintiff O'Brien and answered as follows:

"Q. What part of the truck did your car come in contact with? A. The truck's right bumper hit my right front bumper and wheel, my left front bumper and wheel.

"Q. The truck's what? A. The truck's right.

"Q. Right front bumper? A. That is right.

"Q. Hit what? A. Hit my left front bumper and wheel." (R. p. 273.)

Page 459 of the record contains the following questions by Mr. Daley and answers by the defendant Hobart:

"X-Q. Incidentally, Doctor, you have no confusion in your mind that the right hand side of your truck—your car—means the side opposite the driver? A. That's right.

"X-Q. And there is no confusion in your mind that the truck which you collided with was a truck in which the driver sat on his left side? A. That's right.

"X-Q. And that the right hand side of the truck with which you collided was the side opposite from the driver's seat? A. That's right."

Before the trial concluded, however, the defendant reversed himself completely, as the record shows at page 464:

"X-Q. Do you remember, Dr. Hobart, that when you were first brought to the witness stand you told this jury that the right-hand side of the truck—I'm emphasizing the right-hand side of the truck—collided with the left front of your vehicle? A. I did. I think I erred in that statement.

"X-Q. You know very well it wasn't the right-hand side of the truck that was in contact with you, don't you? A. No, it was the left-hand side of the truck."

The foregoing is typical of testimony by the defendant, who was of little if any assistance to the jury whatsoever.

Of one thing Doctor Hobart was positive. Once he moved into the middle lane on Route 2 he "made no shift to his left" to cause the contact with the truck. This assertion was sought to be buttressed by the defendant by calling to the stand a Mr. Whitney, who was operating the

vehicle behind the Hobart vehicle. In his brief the defendant claims that Whitney's testimony was in his favor. As a matter of fact, it was probably the testimony of Mr. Whitney, the ideally situated witness, which brought to the jury most effectively a vivid word picture that corroborated Michael O'Brien's contention that it was negligence on the part of Doctor Hobart that caused this tragic accident. The following portion of the record (pp. 401, 402) demonstrates beyond doubt that the impact occurred when the defendant Hobart turned his vehicle to the left:

"X-Q. Did you ever see the Hobart car turn to the left at any time from the time you first saw the truck, up until the accident happened? A. He might have turned away.

"X-Q. Not what he might have done, Mr. Whitney. The question is very simple, did you ever see the Hobart car turn to its left at any time between the time you first saw the truck and up until the accident happened? A. Slightly, maybe.

"Mr. Prendergast: I didn't ask you whether it was slight or not. May that go out, Your Honor?

"The Court: 'Slightly,' 'maybe,' yes, it may.

"X-Q. You have no interest in this case, have you? A. No, sir.

"X-Q. You are not prejudiced against the truck driver, are you? A. No, sir.

"X-Q. Let me ask you again, at any time from the time you first saw that truck up and until this accident happened, did you ever see Doctor Hobart's car turn to the left? A. Yes, sir.

"X-Q. And when he turned to the left, the accident happened, didn't it? A. As he was turning, sir.

"X-Q. As he was turning, the accident happened, didn't it? A. Yes, sir.

"X-Q. And you were within fifty feet of this accident when you saw that happening. That is so, isn't it? A. Yes, sir."

This was the testimony by Mr. Whitney which the defendant Hobart would have this Court believe was favorable to the defendant. On the contrary, it coincides exactly with Michael O'Brien's insistence that he was maintaining a straight course with his truck, approaching and passing these mounds of earth, when the defendant (who may have noticed the mound of earth when it was too late) swerved suddenly to his left, hit the rear of the left front wheel of the truck, caused the steering wheel to be wrenched from O'Brien's grasp, and forced the truck out of control.

The defendant in his petition (pp. 19 to 27, incl.) quotes testimony from the witnesses called by him at the trial in a vain effort to establish that the jury could have found that it was the vehicle driven by O'Brien which caused the collision. The short answer to this expansive quotation is that, assuming that the jury could have found in favor of the defendant, there was evidence upon which the jury could and did find in favor of the plaintiff O'Brien.

It was for the finders of fact, the members of the jury, to decide what testimony they would accept and what testimony they would reject. They accepted the version of the accident related by the plaintiff O'Brien.

The respondent submits respectfully that there was such evidence in the case, as the foregoing quotations from the record demonstrate amply. O'Brien "was where he was obliged to be and had a right to be." The jury must have found that Hobart was "where he had no right to be and no excuse for being." On this evidence the jury was warranted in finding Hobart negligent, and O'Brien free from contributory negligence.

Conclusion.

There were several other points argued by the petitioner (such as the Concord District Court record and testimony of John H. Robinson), but these points have been set forth and discussed so completely by the United States Court of Appeals in its decision (Petition for Writ of Certiorari, pp. 47-50) that the respondent feels such points do not warrant further consideration.

The decision of the Court below is correct. The petitioner has failed to present with accuracy, brevity and clearness any considerations warranting a further review. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MICHAEL T. PRENDERGAST,

REUBEN H. NITKIN,

Counsel for Respondent O'Brien.

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IN THE

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PETITION FOR REHEARING OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Now comes the above-named petitioner and respectfully petitions for a rehearing of this Honorable Court's denial of the Petition for Writ of Certiorari in this cause, and in support thereof, respectfully shows unto this Honorable Court as follows:

POINT I

The discrepancies in the trial of this case, coupled with the failure of the jury to render a verdict in accordance with the weight of the evidence and the disregarding by the jury of the law as to contributory negligence, render it of vital importance that this Honorable Court grant the Writ of Certiorari.

The discrepancies in the trial of this case have been pointed out in the Petition for a Writ of Certiorari and the Reply Brief heretofore filed in this Honorable Court. They consist of derogatory comments by counsel for Mr. O'Brien at trial, as tied in with derogatory comments in closing argument; of argument of counsel which was outside the scope of the evidence; and of argument of counsel which was intended to incite the sympathies and prejudices of the jurors.

The failure of the jury to return a verdict in accordance with the evidence adduced at trial has also been fully set forth in the petition and brief hereinabove referred to. Not only did the jury disregard the weight of the verbal testimony at trial but also the jury must have given credence to the testimony of Mr. O'Brien to the effect that the automobile driven by Dr. Hobart ran into the rear of the left front wheel of the truck driven by Mr. O'Brien. The impossibility of such evidence is clearly shown by defendant's Exhibit E-12 (as set forth on page 593, Volume II, of the Consolidated Record Appendix), in which said picture the left door of the cab of Mr. O'Brien's truck and the running board immediately thereunder are portrayed after the accident. Said picture discloses that said door and running board had not been scratched or hurt in any manner as they necessarily would have been, had Mr. O'Brien's testimony been accurate. Indeed, said picture clearly shows that the left front of the truck driven by Mr. O'Brien, at the bumper, was the part of said truck that was in contact in this

accident, and that Mr. O'Brien's testimony could not be worthy of belief."

In said petition and brief, the law with regard to contributory negligence is fully set forth and refers to testimony adduced at trial so as to conclusively show the failure of the jury to have complied with said law.

It is respectfully submitted that the basic reason why this Honorable Court should consider and should grant the writ of certiorari is that the *composite whole* of these discrepancies, coupled with the failure of the jury to do substantial justice, constitute the special and important reasons why this Honorable Court should grant this Petition for a Writ of Certiorari and, upon consideration of this case, reverse the decision of the United States Court of Appeals for the First Circuit and order a new trial. However, as will be pointed out hereinafter, either of two vital points, standing alone, could well constitute such reason.

POINT II

Counsel for Mr. O'Brien made reference to testimony which was not in fact given at trial by the witness John H. Robinson.

It is respectfully submitted that this Honorable Court should not allow a judgment to stand collectable against a litigant in a case in which counsel for his opponent had, in making counsel's appeal to the jury, made reference to testimony which was not adduced at trial. Counsel for petitioner has made a study of the transcript of the testimony adduced in the trial of this case in the United States District Court for the District of Massachusetts to find out whether or not there was any basis for Mr. Prendergast having made the statement regarding the testimony of the witness John H. Robinson, as found on page 518 of the consolidated record appendix, as follows:

> "I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened."

The result of such search is that there is no such testimony. The point regarding Mr. Prendergast having made such reference to such non-existent testimony was clearly brought out in the Petition for Writ of Certiorari filed herein. The answer to such contentions in the Brief in Opposition to Writ of Certiorari did not point out any basis for Mr. Prendergast having made such statement. Instead, counsel for Mr. O'Brien takes the position that a failure by counsel for Dr. Hobart at trial to have objected to the argument constitutes such a waiver of objection as to justify having the litigant Hobart now suffer this terrific judgment against him, all by reason of a failure to make a timely objection. It is respectfully submitted that this brings about a test of the question of whether or not Dr. Hobart received substantial justice in the trial of this case in the United States District Court for the District of Massachusetts. The argument appears to be that since counsel for Dr. Hobart did not make a point of counsel for Mr. O'Brien having made a reference to non-existent testimony, Dr. Hobart should suffer this terrific judgment regardless of whether or not the same constitutes substantial justice.

It is significant that the opinion of the United States Court of Appeals for the First Circuit did not even deal with the point of counsel for Mr. O'Brien having made reference to such non-existent testimony in said counsel's closing argument. Instead said opinion makes reference to an entirely different point regarding the admission of testimony during the cross-examination of the witness Robinson. (Please see pages 50 and 51, Appendix to the Petition for a Writ of Certiorari, filed herein.)

It is respectfully submitted that this point, standing alone, should constitute a sufficient important reason for your Honors to grant the Petition for Writ of Certiorari. *Otherwise, this judgment would stand based at least in part upon argument of counsel regarding at most, if anything, a private conversation between counsel and a witness, who did not see the collision, and not upon testimony adduced at trial.*

POINT III

Re Point regarding verdict not having been in accordance with the evidence and the weight of the evidence.

It is respectfully submitted that the failure of the jury to render a verdict in accordance with the evidence and the weight of the evidence, as applied to the law regarding contributory negligence, standing alone, would constitute a special and important reason why this Honorable Court should grant the Writ of Certiorari and hear argument of counsel in this case.

The position taken by the United States Court of Appeals for the First Circuit with regard to this point is thoroughly discussed on pages 28 through 34 of the Petition for Writ of Certiorari filed herein. It remains unbelievable that a "fair-minded" jury could come to the conclusion that Mr. O'Brien was driving on his side of the road and was not, at least, guilty of contributory negligence.

By the vast preponderance of the evidence and by the pictures introduced in evidence, and, more particularly, defendant's Exhibit E-12, referred to hereinabove under Point I, Mr. O'Brien must have been, at least, guilty of contributory negligence. Indeed, Mr. O'Brien's testimony is rendered unbelievable and he should have been held solely liable by a "fair-minded" jury.

It is respectfully submitted that this point, standing alone, furnishes a sufficiently important and special rea-

son for your Honors to grant the Petition for Writ of Certiorari filed herein.

CONCLUSION

There can be no question but that Dr. Hobart is the victim of a gross miscarriage of justice as a result of the trial in the United States District Court for the District of Massachusetts. The unwarranted references to one of his attorneys to the effect that said counsel could not be trusted or that he would not tell the truth; the quoting of alleged evidence which was not adduced at trial; the pleas to the jury by counsel for Mr. O'Brien, which said pleas were obviously intended to incite the passions and prejudices of the jury; the failure of the jury to base its decision upon the vast preponderance of the testimony and the physical facts as same were brought to their attention at the trial; and the failure of the jury to at least apply said evidence to the law regarding contributory negligence all lead to the inescapable conclusion that Dr. Hobart did not receive substantial justice in this case. The principal points regarding the opinion of the United States Court of Appeals have been set forth hereinabove.

With regard to the requirement that there must be special and important reasons as conditions precedent to this Honorable Court granting a Writ of Certiorari and hearing argument of counsel, it is respectfully submitted that nothing can be more vital to our Constitutional system than that this Honorable Court should exercise supervisory powers where, as in the case which is the subject of this petition, a litigant stands at the mercy of his opponent after a trial in which a gross miscarriage of justice resulted from the discrepancies pointed out hereinabove.

It is most respectfully urged that your Honors reconsider the Petition for Writ of Certiorari filed herein and

grant to petitioner the opportunity to have his counsel argue this case.

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CERTIFICATE OF COUNSEL

The undersigned, attorneys for the Petitioner herein, do hereby certify that the above and foregoing petition is presented in good faith and not for delay, and that the above petition is restricted to the grounds specified in Paragraph 2 of Rule 58 of this Honorable Court.

FORD E. YOUNG, JR.
JOSIAH LYMAN
Attorneys for Petitioner